REPORT ON THE

ROYAL COMMISSION ON THE

CONSTITUTION

Acc. No: 14229.

1929.

(SECOND SESSION.)

13

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

REPORT

OF THE

ROYAL COMMISSION

ON THE

CONSTITUTION,

TOGETHER WITH

APPENDICES AND INDEX:

Presented by Command, 21st November, 1929; ordered to be printed, 13th December, 1929.

[*Cost of Paper.*—Preparation not given; 900 copies; approximate cost of printing and publishing, £503.]

Printed and Published for the GOVERNMENT of the COMMONWEALTH of AUSTRALIA by H. J. GREEN, Government Printer, Canberra.

No. 16.—F.1251.—PRICE 16S. 9D.

COMMONWEALTH OF AUSTRALIA.

GEORGE THE FIFTH, *by the Grace of God of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India:*

TO *our trusty and well-beloved* THE HONORABLE JOHN BEVERLEY PEDEN, *K.C., M.L.C.* ; SENATOR PERCY PHIPPS ABBOTT, *C.M.G., V.D.;* THOMAS RAMSDEN ASHWORTH, *Esquire;* THE HONORABLE ERIC KENDALL BOWDEN, *M.P.;* THE HONORABLE SIR HAL PATESHALL COLEBATCH, *K.B., C.M.G.;* MAURICE BOYCE DUFFY, *Esquire, J.P.;* THE HONORABLE DANIEL LAURENCE MCNAMARA, *M.L.C.*

GREETING:

KNOW *ye that We do by these Our Letters Patent, issued in Our name by Our Deputy of Our Governor-General of Our Commonwealth of Australia, acting with the advice of Our Federal Executive Council, and in pursuance of the Constitution of Our said Commonwealth, the "Royal Commissions Act* 1902-1912," *and all other powers him thereunto enabling, appoint you to be Commissioners to inquire into and report upon the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation; to recommend constitutional changes considered to be desirable; and, in particular, to examine and report upon the following subjects from a constitutional point of view:—*

(*i*) *Aviation.*
(*ii*) *Company law,*
(*iii*) *Health,*
(*iv*) *Industrial powers,*
(*v*) *Interstate Commission,*
(*vi*) *Judicial power,*
(*vii*) *Navigation law,*
(*viii*) *New States,*
(*ix*) *Taxation, and*
(*x*) *Trade and commerce:*

AND WE APPOINT you the said JOHN BEVERLEY PEDEN *to be the Chairman of the said Commissioners:*

AND WE DIRECT *that, for the purpose of taking evidence, four Commissioners shall be sufficient to constitute a quorum, and may proceed with the inquiry under these Our Letters Patent:*

AND WE REQUIRE *you with as little delay as possible to report to Our Governor-General of Our said Commonwealth the result of your inquiries into the matters entrusted to you by these Our Letters Patent:*

IN TESTIMONY WHEREOF *We have caused these Our Letters to be made Patent, and the Seal of Our said Commonwealth to be thereunto fixed.*

WITNESS *our trusty and well-beloved the Honorable Sir* WILLIAM HILL IRVINE, *Knight Commander of Our Most Distinguished Order of Saint Michael and Saint George, Our Deputy of Our Governor-General and Commander-in-Chief in and over Our Commonwealth of Australia, this eighteenth day of August, in the year of our Lord One thousand nine hundred and twenty-seven, and in the eighteenth year of Our Reign.*

W. H. IRVINE,
Deputy of the Governor-General.

By His Excellency's Command,

S. M. BRUCE,
Prime Minister.

ENTERED *on record by me, in Register of Patents, No. 56, page 24, this eighteenth day of August, One thousand nine hundred and twenty-seven.*

F. STRAHAN.

THE COMMONWEALTH OF AUSTRALIA.

REPORT ON THE CONSTITUTION.

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THE COMMONWEALTH OF AUSTRALIA.

ROYAL COMMISSION ON THE CONSTITUTION.

Report of the Commissioners.

To His Excellency the Right Honorable JOHN LAWRENCE, BARON STONEHAVEN, *a Member of His Majesty's Most Honorable Privy Council, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Companion of the Distinguished Service Order, Governor-General and Commander-in-Chief in and over the Commonwealth of Australia.*

MAY IT PLEASE YOUR EXCELLENCY:

We have the honour to report to Your Excellency the result of our inquiries into the matters entrusted to us by Letters Patent dated the 18th day of August, 1927.

I.—PRELIMINARY.

The Letters Patent.

The Letters Patent directed us to inquire into and report upon the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation; to recommend constitutional changes considered to be desirable; and in particular to examine and report upon the following subjects from a constitutional point of view:—

1. Aviation.
2. Company law.
3. Health.
4. Industrial powers.
5. Interstate Commission.
6. Judicial power.
7. Navigation law.
8. New States.
9. Taxation.
10. Trade and Commerce.

The directions to inquire into the powers of the Commonwealth and the working of the Constitution made it our duty to obtain such information in regard to these matters as appeared to be of sufficient importance, whether the result of our investigation might or might not indicate any need for constitutional changes. At the same time the duty of recommending any constitutional changes considered to be desirable made it necessary for us to note specially any facts relating to the existing powers of the Commonwealth and the working of the Constitution that seemed likely to throw light on the question whether, and if so, in what respects the Constitution should be altered.

The enumeration of the ten subjects specifically mentioned in the Letters Patent did not appear to limit the scope of the investigation which it was our duty to make or to restrict the nature or range of the recommendations that we were at liberty to submit, as the directions to inquire into the powers of the Commonwealth and the working of

the Constitution, and to make recommendations, were expressed in wide and general terms. Accordingly we have received and considered evidence on some questions—for example, questions in regard to aborigines and forestry—which do not come within the specified subjects, and we have received and considered evidence not only on proposals to alter various provisions of the Constitution without destroying its federal character, but also on the question whether the present system should be replaced by a scheme of unitary government.

The Inquiry.

At the first public sittings, which were held at the Seat of Government, a memorandum was read by the Chairman drawing attention to the nature of the duties assigned to the Commission, expressing its desire to have the help and co-operation of everyone who was in a position to give assistance, and announcing its intention to take evidence in each of the States. Publicity was given to these statements through the press at the time and before the sittings in each State.

Throughout the inquiry the Commission sought to obtain evidence, and to afford opportunities for evidence being given, on all matters within the terms of reference. It issued invitations and requests to representative bodies, individual witnesses and various Commonwealth and State Departments—in the case of State Departments after communications had been addressed to the State Premiers expressing the desire of the Commission to receive such evidence as their Governments might see fit to place before it, and asking that officers of their Governments might be permitted to give evidence. The representative bodies included the industrial organizations of employers and employees registered under the Commonwealth Conciliation and Arbitration Act, the industrial organizations of employers and employees in each State, the Employers' Federations, the Chambers of Commerce and Chambers of Manufactures in the principal cities of the Commonwealth, the Institutes of Accountants, the Institutes of Secretaries, the Insurance Institutes, the associations representing the legal profession, the women's organizations, the Constitutional Associations, the Australian Natives Association, the political associations, and the associations advocating the creation of new States.

Invitations were sent to the surviving members of the Federal Conventions, and to a number of other persons whose knowledge and experience would assist the work of the Commission.

General invitations were issued through the press in each State to persons who desired to give evidence on any matter within the scope of our inquiries.

Evidence was taken at the Seat of Government, at the capital of each State, and at Launceston, Armidale, Rockhampton and Townsville. The visits of the Commission to each State afforded opportunities to persons who desired to give evidence, enabled the Commission to obtain evidence which it would have been difficult or impracticable to procure in any other way, and gave the Commission the advantage of hearing the evidence affecting the interests of each State presented within the State concerned and of being in a position to estimate the value and weight of evidence relating to the conditions in different parts of the Commonwealth.

In South Australia a case was presented on behalf of the State Government, and in each of the other States the State Government permitted its officers to give evidence, though in some instances they were not to be asked to express opinions on questions of policy, and in Victoria the Premier then in office expressed his regret that he was unable to accede to the request that the Permanent Head of the Department of Public Health and the Chairman of the Victorian Forests Commission should be permitted to give evidence.

The Commission examined 339 witnesses and obtained a large body of valuable evidence, which in many instances was the outcome of great ability, special knowledge and wide experience, and could only have been presented in the manner in which it was after the witnesses had devoted much time and thought to its preparation. It would be an invidious task for us to select the names of those whose evidence was a specially important contribution to the work of the Commission, but it is fitting that we should mention that we had the advantage of hearing an account of the provisions of the Constitution, and of various aspects of its working, from Sir Robert Garran, Solicitor-General for the Commonwealth, who was intimately associated with the framing of the Constitution, and whose experience of its working since Federation is unique.

Apart from the great assistance which the Commission received from officers of the Commonwealth and the States who prepared information on numerous matters connected with the working of the Constitution, many facilities, including convenient accommodation for sittings, were given to the Commission, whenever the occasion arose, through the courtesy of State Governments, Presidents and Speakers of State Houses of Parliament, and civic and other public authorities.

The Commission had the advantage of the assistance of counsel, Mr. H. S. Nicholas, whose presentation of the issues and the evidence was marked by conspicuous ability and fairness, and whose addresses, printed with the evidence (pp. 4, 1662), were a valuable and illuminating study of the interpretation and working of the Constitution, and of the proposals for its alteration. Mr. Nicholas appeared before the Commission at the Seat of Government and in each of the States.

The Commission also desires to record its appreciation of the services of Mr. J. G. Hardman, LL.B., who has zealously and efficiently carried out the administrative and other important work involved in his duties as Secretary to the Commission.

The Commission held 198 sittings for the examination of witnesses, the consideration of evidence and the preparation of this report.

II. THE SECTIONS OF THE REPORT.

In order to give a clear and orderly account of the various matters that come within the scope of the report, with such comments as may be needed to indicate the importance of each matter in relation to the Constitution or to any proposals for its alteration, it seems to us to be essential, or at least desirable, in the first instance, to make a brief survey of the Constitution as determining the powers and affecting the relations of the Commonwealth and the States, and to state shortly the more important facts with respect to the territory, the population, and the government of the Commonwealth and the States and Territories. Sections iii., iv., v., vi. and vii. of the report, which deal with these matters, include some of the more important facts with respect to the working of the Constitution, the more detailed consideration of the powers of the Commonwealth and the discussion of other aspects of the working of the Constitution being reserved for later sections.

Sections viii. and ix. deal with essential elements of the federal system of the Commonwealth—the powers of legislation conferred on the Commonwealth Parliament, and the judicial power of the Commonwealth with the High Court as the interpreter of the Constitution.

Sections x., xi., xii. and xiii., which deal with external affairs, defence, taxation, and appropriation of revenue, give an account of the relations of the Commonwealth with the rest of the Empire and with foreign countries, explain how the powers of the Commonwealth in regard to defence and taxation have been interpreted by the High Court, discuss the purposes for which revenue may be appropriated, and describe how the powers of the Commonwealth have been exercised in the conduct of external affairs, the establishment of the defence system, and the conduct of the finances of the Commonwealth.

Sections xiv., xv. and xvi. examine the operation of the provisions of the Constitution with respect to trade and commerce, freedom of trade commerce and intercourse among the States, navigation and shipping, and industrial disputes. Section xvii. deals with the work of the Commonwealth in connexion with public health, some aspects of which come within the quarantine power. Some of these matters come within the subjects specifically referred to the Commission, but in view of the importance of all of them in the working of the Constitution it is convenient to deal with them before considering the questions with which sections xviii. and xix. are concerned.

Sections xviii. and xix. are primarily concerned with the working of the Constitution, and describe the co-operation and financial relations of the Commonwealth and the States.

Section xx. deals with the ten subjects specifically referred to the Commission and with other matters on which a report appears to be desirable, so far as they are not sufficiently dealt with in the previous parts of this report.

Subject to one exception, sections iii.—xx. embody the result of our inquiries into the powers of the Commonwealth under the Constitution and the working of the Constitution since Federation. The

exception is in regard to the power of altering the Constitution. The questions relating to the alteration of the Constitution are dealt with in section xxi.

The general recommendations made by the majority and by the minority in regard to a system of government for Australia are set out in section xxii.

The recommendations made unanimously or by majority in regard to specific subjects are set out in section xxiii.

Section xxiv. contains supplements and recommendations by one or more members of the Commission.

III. THE CONSTITUTION OF THE COMMONWEALTH AS DETERMINING THE POWERS AND AFFECTING THE RELATIONS OF THE COMMONWEALTH AND THE STATES.

Federation.

The establishment of the Commonwealth, on the first day of January, 1901, set up a new order of things. The new political organization of Australia determined the constitutional powers of the Commonwealth and the States. It brought into existence a new set of relations for the States, both as between the Commonwealth and the States and as between the States themselves, and affected not only their political but also their economic and financial position. Before Federation New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania, were separate self-governing Colonies. Each Colony had been in existence, independently of the others, for many years. New South Wales and Victoria had had responsible government from 1855, South Australia and Tasmania from 1856, Queensland from 1859, and Western Australia from 1890. Each Colony had its own Constitution, with its own Parliament, Executive Government and Courts, and each had its own fiscal system. The people of the six Colonies agreed to unite in an indissoluble Federal Commonwealth, under the Crown of the United Kingdom, on the terms set out in the Constitution. Legal effect was given to the Constitution by an Act of the Parliament of the United Kingdom, the Commonwealth of Australia Constitution Act, and the Commonwealth came into being on the day appointed in the Proclamation under that Act. The six Colonies became States of the Commonwealth, but each preserved its identity as a self-governing community. In replacing the system of separate Colonies by a system of federated States the Constitution provided for the government of Australia as a whole. Henceforth the people of Australia and the people of its several States were to be governed in accordance with the Constitution as the fundamental law for both the Commonwealth and the States, though each State retained its own Constitution except so far as it was altered or controlled by the Constitution of the Commonwealth. As the States already had their own organs and powers of self-government, the Constitution was primarily concerned with the organs and powers of the central government. The powers of the central government are often spoken of as the powers of the Commonwealth as distinguished from the powers of the States.

The more important provisions of the Constitution.

It will, we think, be convenient in giving an account of the existing powers of the Commonwealth and the working of the Constitution, and in explaining the nature of any constitutional changes considered desirable, to refer briefly in the first place to the more important provisions of the Commonwealth of Australia Constitution Act, and of the Constitution, which is a distinct part of that Act, so far as they need to be borne in mind in connexion with the task assigned to the Commission. These provisions relate to (*a*) the operation of the Act and of laws made by the Parliament of the Commonwealth; (*b*) the Parliament, the Executive Government and the Judicature of the

Commonwealth; (*c*) the distribution of legislative powers between the Commonwealth and the States; (*d*) the economic and financial position of the States in relation to the Commonwealth; (*e*) freedom of trade commerce and intercourse among the States; (*f*) the creation of new States; and (*g*) the alteration of the Constitution. A copy of the Commonwealth of Australia Constitution Act, incorporating the amendments of the Constitution, is appended to this report for convenience of reference (*Appendix A*).

The operation of the Constitution and Laws of the Commonwealth.

The Commonwealth of Australia Constitution Act, which consists of nine sections, usually referred to as the "covering clauses", and which sets out in the ninth of these clauses the one hundred and twenty-eight sections of the Constitution, contains an express provision with respect to the operation of the Act and of the laws made by the Parliament of the Commonwealth. The Act itself, that is, both the covering clauses and the Constitution, and all laws made by the Parliament of the Commonwealth under the Constitution, are binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State (covering clause 5). The area within which the Act and Commonwealth legislation may operate is, in general, the area within the territorial limits of the Commonwealth, including the land and, at all events for most purposes, the territorial waters of the States and Territories. Outside territorial limits the laws of the Commonwealth are to be in force on all British ships, the Sovereign's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth (covering clause 5). The Parliament may give its legislation an extra-territorial operation in other cases, if the power to do so is conferred on it by the Constitution or any British Act expressly or by necessary implication (16 C.L.R. at p. 703).

Legislative, Executive and Judicial Powers.

The legislative, executive and judicial powers of the Commonwealth are vested, or are to be vested, in separate organs of government—the legislative power in a Federal Parliament, the executive power in the Sovereign, and the judicial power in the High Court, and certain other courts (ss. 1, 61, 71). The Constitution, however, does not make a complete "separation of powers". It is not true that each of the powers is vested in a separate organ in such a way that a power vested in one organ can be exercised by that organ only, and cannot be conferred upon any other organ. The power to make regulations and ordinances can be delegated to the Executive by the Parliament (*Roche* v. *Kronheimer*, 29 C.L.R., p. 329). But the Parliament cannot either take away from the High Court jurisdiction assigned to it by the Constitution (*Tramways* case (No. 1), 18 C.L.R. 54), or assign to the High Court any duty which is not judicial (*in re Judiciary Act and the Navigation Act*, 29 C.L.R. 257). Nor can the Parliament vest judicial power except in a Court within the meaning of sections 71 and 72 of the Constitution (*Alexander's* case, 25 C.L.R. 434; the *British Oil Company's* case, 35 C.L.R. at pp. 432, 433).

The Parliament of the Commonwealth.

The Commonwealth Parliament consists of the Sovereign, the Senate and the House of Representatives (s. 1). A Governor-General appointed by the Sovereign is to be His representative in the Commonwealth (s. 2). When a proposed law, after being passed by both Houses, is presented to the Governor-General for the royal assent, the Governor-General assents in the Sovereign's name. The Governor-General cannot be fettered by any instructions in regard to assenting, withholding assent, or reserving bills. He is to act in these matters according to his discretion, but subject to the Constitution, under which bills affecting the prerogative of the Crown to grant leave of appeal to the Privy Council must be reserved for the royal assent (ss. 58, 74). An Act may be disallowed by the Sovereign within one year from the Governor-General's assent (s. 59).

The Senate is composed of Senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate. Until the Parliament otherwise provides, there are to be six Senators for each of the six original States. The Parliament may make laws increasing or diminishing the number of Senators for each State, but the principle of equal representation of each of the original States is to be maintained and no original State is to have less than six Senators. The Senators are to be chosen for a term of six years and are to retire by rotation, half at the end of every three years (ss. 7, 13). The term of service of a Senator is to begin on the first day of July following his election, except where there is a dissolution of the Senate (under section 57), when it is to begin on the first day of July preceding his election, and the election to fill vacant places is to be made within one year before the places are to become vacant (s. 13, as amended by *Constitution Alteration* (*Senate Elections*) 1906). Provision is made for filling casual vacancies (s. 15).

The House of Representatives is composed of members directly chosen by the people of the Commonwealth, and the number of such members is to be, as nearly as practicable, twice the number of the Senators. The number of members chosen in the several States is to be in proportion to population, but five members at least are to be chosen in each original State (s. 24). The Parliament may make laws increasing or diminishing the number of members of the House of Representatives, but this power is subject to the fundamental conditions set out in the Constitution (s. 27). The two to one ratio of the number of the members of the House of Representatives to the number of the Senators must be maintained, the distribution of the members of the House of Representatives between the States must continue to be in proportion to the population of each State, and the minimum representation of five members for each original State must be preserved. The life of a House of Representatives is for three years from the first meeting of the House, unless there is a dissolution (s. 28). A dissolution will, in general, apply only to the House of Representatives, but both Houses may be dissolved simultaneously in the circumstances set out in section 57. In the first Parliament the number of members of the House of Representatives for each State was to be as follows:—New South Wales, twenty-six; Victoria, twenty-three; Queensland, nine; South Australia, seven; Western Australia, five; Tasmania, five (s. 26).

The qualification of electors of Senators in each State is to be the same as the qualification for electors of members of the House of Representatives. At each election an elector can vote only once. This restriction applies to the election of members of either House. The Parliament may prescribe the qualification of electors, but no adult who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State is, while the right continues, to be prevented by any law of the Commonwealth from voting at elections of either House of the Parliament of the Commonwealth (ss. 8, 30, 41). The qualifications of a Senator are to be the same as those of a member of the House of Representatives (s. 16). The Parliament may prescribe the qualifications of a member of the House of Representatives (s. 34). A person who is subject to any of the disabilities mentioned in section 44 cannot be a member of either House. A member of either House, who becomes subject to any of those disabilities, or who otherwise becomes disqualified under section 45, is to forfeit his seat. The Parliament may make laws for determining questions with respect to qualifications, vacancies, and disputed elections (s. 47).

The relations of the two Houses in regard to legislation are defined by the provisions of the Constitution with respect to money bills and a double dissolution. Except as to money bills, the Senate has equal power with the House of Representatives, but if there is a deadlock, the House of Representatives may bring about a double dissolution. The Senate's power in regard to money bills is subject to certain restrictions, and at the same time the Senate is protected against tacking. The Senate cannot (*a*) originate a taxing bill or an appropriation bill; (*b*) amend a taxing bill or a bill appropriating revenue or moneys for the ordinary annual services of the government; or (*c*) amend any bill so as to increase any proposed charge or burden on the people. It can, however, at any stage return to the House of Representatives any of the bills which it cannot amend, with a request for the omission or amendment of any item or provision, and the House of Representatives may, if it thinks fit, comply with the request, with or without modifications (s. 53). The House of Representatives cannot coerce or embarrass the Senate by tacking or by the form in which money bills are sent to the Senate. An appropriation bill for the ordinary annual services of the government is to deal only with such appropriation (s. 54). A taxing Act can deal only with the imposition of taxation. If it contains a provision dealing with any other matter, the provision is of no effect. Except in the case of an Act imposing duties of customs, or of excise, a taxing Act can deal with one subject of taxation only. An Act imposing duties of customs can deal with duties of customs only. An Act imposing duties of excise can deal with duties of excise only (s. 55). To overcome a deadlock between the two Houses in matters with respect to which their powers are co-ordinate, the House of Representatives may send a bill to the Senate twice, either in the same session or in successive sessions, with an interval of three months between the two occasions, and if there is still a deadlock both Houses may be dissolved simultaneously. If the dispute continues after the election, the questions involved may be decided at a joint sitting. The House of Representatives cannot force a double dissolution in the last six months of its own life (s. 57).

The Constitution authorizes the Commonwealth Parliament to complete the scheme of government in accordance with the Constitution and to provide for many things necessary or convenient for its working. The matters which come within these powers include (*a*) the franchise (ss. 8, 30); (*b*) electorates and elections (ss. 7, 9, 29, 31); (*c*) the Departments of State for the Commonwealth (ss. 65, 66); (*d*) the Public Service (s. 67); (*e*) appeals to the High Court (s. 73); (*f*) appeals from the High Court to the Privy Council (s. 74); (*g*) original jurisdiction of the High Court (s. 76); (*h*) creation of Federal Courts (ss. 71, 72); (*i*) investing State courts with federal jurisdiction (s. 77 (iii)); and (*j*) making the jurisdiction of Federal Courts exclusive of the jurisdiction of State Courts (s. 77 (ii)). In regard to some of these matters the power to make laws is conferred on the Parliament in general terms, but in regard to others the power can only be exercised within certain limits and subject to certain conditions.

The Executive Power of the Commonwealth.

The executive power of the Commonwealth is exercisable by the Governor-General as the Sovereign's representative, and extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth (s. 61). There is to be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth. Its members are chosen and summoned by the Governor-General, and hold office during his pleasure (s. 62). The Governor-General may appoint Ministers, holding office during his pleasure, to administer Commonwealth Departments, but a Minister must have a seat in Parliament, or obtain a seat within three months (s. 64). It is clearly implied that the principle of responsible government is a fundamental element in the Constitution (*Baxter's* case, 4 C.L.R. at pp. 1105-1107; the *Engineers'* case, 28 C.L.R., at pp. 146-148).

The Judicial Power of the Commonwealth.

The judicial power of the Commonwealth is exercisable only by the Courts mentioned or referred to in section 71 of the Constitution. These are a Federal Supreme Court, called the High Court of Australia, such other Federal Courts as the Parliament creates, and such other Courts as it invests with federal jurisdiction. The Justices of the High Court and of Courts created by the Parliament cannot be removed except in the way provided in section 72, that is, by the Governor-General, acting with the advice of the Executive Council, on an address from both Houses of the Parliament in the same session, praying for removal on the ground of proved misbehaviour or incapacity. The judicial power of the Commonwealth consists of the appellate jurisdiction of the High Court, and the jurisdiction over the matters mentioned in sections 75 and 76.

The High Court has both appellate and original jurisdiction. As an appellate tribunal it is the head, within Australia, of both the Federal and State judicial systems. It is a Federal court of appeal from Federal Courts and from State Courts exercising federal jurisdiction; an Australian court of appeal from the State Supreme Courts; and a court of appeal, but as to questions of law only, from the Inter-State Commission (s. 73). As a Federal court of appeal it may entertain

appeals from any Justice or Justices exercising the original jurisdiction of the High Court, and appeals from any other Federal Court or from any State Court exercising federal jurisdiction. Any such appeal may be excluded by legislation of the Federal Parliament. As an Australian court of appeal it can entertain appeals from the Supreme Court of any State, or from any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Privy Council, and accordingly may decide matters arising under the laws of any State. The Commonwealth Parliament cannot exclude an appeal to the High Court from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lay from that Court to the Privy Council (s. 73). In matters arising under the laws of a State a litigant has the choice of appealing from a State Supreme Court either to the High Court or to the Privy Council, and the Commonwealth Parliament has no power to prevent him from appealing direct from the Supreme Court of a State to the Privy Council.

Where an appeal is taken to the High Court either as a Federal or an Australian court of appeal, there is no appeal as of right to the Privy Council (s. 73). There may, however, be an appeal from the High Court to the Privy Council (*a*) on any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, if the High Court certifies that the question is one which ought to be determined by the Privy Council; and (*b*) in other cases, whether they involve constitutional questions or questions of Federal or State law, if the Privy Council itself grants special leave. The Commonwealth Parliament may make laws limiting the matters in which such leave may be obtained, but any bill passed for this purpose must be reserved by the Governor-General for the royal assent (s. 74).

The original jurisdiction of the High Court can only extend to the matters mentioned in sections 75 and 76. Section 75 confers original jurisdiction on the High Court in matters (*a*) arising under any treaty; (*b*) affecting consuls or other representatives of other countries; (*c*) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; (*d*) between States, or between residents of different States, or between a State and a resident of another State; (*e*) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Under section 76 the Federal Parliament may confer original jurisdiction on the High Court in any matter (*a*) arising under the Constitution or involving its interpretation; (*b*) arising under any laws made by the Parliament; (*c*) of admiralty and maritime jurisdiction; (*d*) relating to the same subject-matter claimed under the laws of different States.

The Commonwealth Parliament may (*a*) define the jurisdiction of any Federal Court other than the High Court; (*b*) define the extent to which the jurisdiction of any Federal Court is to be exclusive of that which belongs to or is invested in the Courts of the States; (*c*) invest any Court of a State with federal jurisdiction (s. 77). In each case jurisdiction can only be conferred with respect to matters mentioned in sections 75 and 76, but apparently may be either original or appellate

jurisdiction. The Parliament may also make laws conferring rights to proceed against the Commonwealth or the States in respect of matters within the limits of the judicial power (s. 78; *Commonwealth* v. *New South Wales,* 32 C.L.R. 200).

The trial on indictment of any offence against any law of the Commonwealth is to be by jury (s. 80). This provision extends only to an offence made triable on indictment, and does not preclude the Commonwealth Parliament making an offence triable otherwise than on indictment (*R.* v. *Bernasconi,* 19 C.L.R. at p. 637).

The distribution of Legislative Powers between the Commonwealth and the States.

The power to make laws in Australia is distributed between the Commonwealth and State Parliaments in accordance with "the legislative compact made between the Commonwealth and the States" (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.,* 1914 A.C. at p. 256; 17 C.L.R. at p. 655). Selected or enumerated powers are vested in the Commonwealth Parliament, and the residual powers remain with the State Parliaments (ss. 51, 52, 107). Lists of the matters with respect to which the Commonwealth Parliament may make laws are set out in sections 51 and 52, but other sections also confer powers of legislation on the Commonwealth Parliament (e.g. ss. 76, 77, 78, 102, 112).

With respect to certain matters the Commonwealth Parliament only may make laws, and in regard to these matters it is said to have an exclusive power. With respect to certain other matters either the Commonwealth Parliament or a State Parliament may make laws, and in regard to these matters the Commonwealth Parliament is said to have a concurrent power. Where the Constitution has not vested a power exclusively in the Commonwealth Parliament or withdrawn it from a State Parliament, the powers of a State Parliament continue as at the establishment of the Commonwealth (s. 107). With respect to matters which do not come within either the exclusive or the concurrent powers of the Commonwealth Parliament, the State Parliaments only may make laws, and in regard to these matters they are said to have an exclusive power (the *Sugar Company's* case, 17 C.L.R. at p. 653; the *Engineers'* case, 28 C.L.R. at p. 154).

The distinction between the concurrent and exclusive powers of the Commonwealth Parliament does not limit its powers or affect the scope of its legislation. Matters within its concurrent powers are only left to the State Parliaments so long as the Commonwealth Parliament does not see fit to supersede or exclude State legislation. A State Parliament has, for instance, concurrent power to make laws with respect to marriage and divorce. It has been free to do this from the establishment of the Commonwealth, as the Commonwealth Parliament has not, except for the special purpose of the *Matrimonial Causes (Expeditionary Forces) Act* 1919, legislated on these matters. The Commonwealth Parliament may at any time enter the field and indicate, expressly or impliedly, that its legislation is to be the only law within the field. It may at any time vacate a field, but so long as it occupies it, a State Parliament is excluded to the extent to which the field is covered by Commonwealth legislation.

Any valid Commonwealth law has supremacy over a State law. Under section 109, when a law of a State is inconsistent with a law of the Commonwealth, the latter prevails and the former is, to the extent of the inconsistency, invalid. The most obvious application of this section is to laws within the concurrent field, but the section is not limited to such laws. It applies to every valid Commonwealth law (the *Engineers' case*, 28 C.L.R. at p. 155). Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. The vital question is whether a Commonwealth Act on its true construction is intended to cover the whole field. If it is so intended, the inconsistency is in giving effect to a State Act, because the Commonwealth legislation is intended to exclude State legislation (*Cowburn's* case, 37 C.L.R. at pp. 478, 489).

The financial provisions of the Constitution.

The "compact" between the Commonwealth and the States includes the financial provisions of the Constitution, and in particular those which are grouped in Chapter IV. under the heading of Finance and Trade. They deal, among other matters, with (*a*) the control of customs and excise; (*b*) the appropriation of Commonwealth revenue and the distribution of surplus revenue among the States; (*c*) the grant of financial assistance to any State; and (*d*) the taking over of State debts.

The Commonwealth Parliament has a general power of taxation, but not so as to discriminate between States or parts of States (s. 51 (ii)). It has an exclusive power of customs and excise taxation (s. 90). This power became exclusive as from the 8th October, 1901 (*Customs Tariff* 1902, s. 4), and thereupon the States could not continue or set up any barrier against interstate freetrade, though there was a special provision under which Western Australia might, during the next five years and subject to certain limitations, have its own tariff for goods passing into that State and not originally imported from beyond the limits of the Commonwealth (s. 95).

All Commonwealth revenue is to form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth. The appropriation is to be in the manner and subject to the charges and liabilities imposed by the Constitution (s. 81). The manner of appropriation is prescribed by s. 83, that is, appropriation is to be made "by law". The charges and liabilities include the cost of collection, the salary of the Governor-General and the salaries of the Justices of the High Court and other Federal Courts (ss. 82, 3, 72). For the first ten years at least they also included the obligation imposed by the "Braddon clause" (s. 87), under which the Commonwealth was not to apply more than one-fourth of the net customs and excise revenue towards its own expenditure, and was to pay the balance to the States, or apply it towards the interest on State debts, in accordance with the provisions relating to different periods within the duration of the clause (ss. 87, 89, 93, 94).

The first charge is the expenditure for the collection, management and receipt of the Consolidated Revenue Fund, and in the first instance Commonwealth revenue is to be applied to the payment of Commonwealth expenditure (s. 82). Once the charges and liabilities are provided for, together with, it seems, the obligations imposed on the

Commonwealth by the financial agreement recently made between the Commonwealth and the States, the Commonwealth Parliament may appropriate the whole of the Consolidated Revenue Fund, if it sees fit, "for the purposes of the Commonwealth," and any money lawfully appropriated for such purposes will not be surplus revenue distributable among the States. What is a Commonwealth purpose is an important question which has not yet been settled by any decision of the High Court and will be discussed later in this report, but if all the Commonwealth revenue is duly appropriated, though not actually spent, there is no surplus (*New South Wales* v. *The Commonwealth*, 7 C.L.R. 179).

The basis on which surplus revenue of the Commonwealth was to be distributed among the States for the first five years after the imposition of uniform customs duties was fixed by the Constitution (ss. 87, 89, 93). After the experience gained in the working of the system during that period the Commonwealth Parliament was to be at liberty to alter the basis (s. 94). This power could be used during the remainder of the period contemplated by the "Braddon clause", but section 94 is not limited to the initial stages of Federation. It does not guarantee to the States that there will be any surplus, but if at any time there is a surplus in the sense explained in *New South Wales* v. *Commonwealth* (7 C.L.R. 179), that is, a sum not stated by law to be needed for Commonwealth purposes, it is, according to one view of the meaning of the section, to be distributed among the States by monthly payments on such basis as the Commonwealth Parliament thinks fit, or, according to the rival view, it may be so distributed. The first mentioned of these views was, it seems, taken by all the five Justices of the High Court, who decided *New South Wales* v. *The Commonwealth*, though the point was not fully argued, as it was not necessary for the actual decision (7 C.L.R. at pp. 188, 196, 199, 202, 205).

The Commonwealth Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit. This power continues during a period of ten years from the establishment of the Commonwealth and thereafter until the Parliament otherwise provides (s. 96). Its nature and scope were considered by the High Court in *Victoria* v. *The Commonwealth* (38 C.L.R. 399) in connexion with the *Federal Aid Roads Act* 1926, which authorized the execution by or on behalf of the Commonwealth of an agreement with each State to make available to the State a sum of money, for the construction and reconstruction of certain classes of roads, subject to the terms and conditions of the agreement, including the carrying out of the work by contract as the general method of construction. The validity of the Act was contested by three States on the ground, amongst others, that the terms and conditions referred to in section 96 are financial terms and conditions unless they are terms and conditions falling within one of the legislative powers in section 51, and also on the ground that if one State only received money from the Commonwealth the Act would give preference to one State over other States in contravention of section 99. All the members of the Court were unanimous in holding that the Act is valid. "It is plainly warranted by the provisions of sec. 96 of the Constitution, and not affected by those of sec. 99 or any other provisions of the Constitution, so that exposition is unnecessary" (*ibid* at p. 406).

The Commonwealth Parliament may take over from the States their public debts, or a proportion of those debts in accordance with section 105, which until its amendment in 1910 applied only to debts existing at the establishment of the Commonwealth. It may convert, renew, or consolidate the debts or any part of the debts. The States are to indemnify the Commonwealth in respect of the debts taken over. The interest payable in respect of the debts is to be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, the deficiency or the whole amount is to be paid by the several States (s. 105). Apparently during the currency of the financial agreement recently made between the Commonwealth and the States, this section is to be read subject to the terms of that agreement.

Under section 105A, inserted by *Constitution Alteration (State Debts)* 1928, the Commonwealth may make arrangements with respect to the public debts of the States, and to Commonwealth and State borrowing. These powers include the making of agreements with respect to taking over State debts, management, payment of interest and provision and management of sinking funds, consolidation, renewal, conversion and redemption, and indemnification of the Commonwealth. They also include the making of agreements with respect to borrowing by the States or by the Commonwealth or by the Commonwealth for the States. The Commonwealth Parliament may make laws for validating an agreement made before the commencement of the section. It may make laws for the carrying out of an agreement. An agreement may be varied or rescinded by the parties. An agreement or variation is to bind the parties, notwithstanding anything contained in the Commonwealth Constitution or in a State Constitution or in any Federal or State law. The powers conferred by the section are not limited in any way by the provisions of section 105.

Freedom of trade commerce and intercourse among the States.

Trade commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, are to be absolutely free (s. 92). Section 92 came into operation as soon as uniform customs duties were imposed, though there was a temporary provision with respect to goods previously imported into one State and passing into another State within two years after the imposition of such duties. The view which was expressed in some of the earlier judgments of the High Court that the section binds both the Commonwealth and the States has been overruled, and it has now been held that the sole purpose of the section is to prevent a State Parliament legislating so as to interfere with the freedom prescribed by the section (*James* v. *South Australia*, 40 C.L.R. at p. 41). The scope of the section has been considered by the High Court in a number of important cases which involved questions as to the validity of State legislation, so far as it concerned trade commerce or intercourse among the States, in regard to a variety of matters, including, for example, price-fixing, marketing of dried fruits, safeguards against the introduction of cattle affected or supposed to be affected by disease, and the coming in of persons who have served a sentence for a crime in another State.

New States.

Power to establish new States is conferred on the Commonwealth Parliament by s. 121, but where an existing State is concerned no portion of its territory is to be taken for this purpose without the consent of its Parliament. The section deals also with the admission of new States to the Commonwealth, that is, the admission of communities which are outside its territorial limits, while the establishment of new States refers to areas within those limits. A new State may be established out of either Federal or State Territory (covering clause 6, s. 124), but at the establishment of the Commonwealth, and until Papua was placed under its authority in 1905, the only territory to which section 124 could apply was State territory. The Commonwealth Parliament may of its motion create a new State out of Federal territory, whether it is territory surrendered by a State to the Commonwealth, or territory placed by the Sovereign under its authority, or territory otherwise acquired by it, but probably this power does not extend to the Seat of Government (ss. 111, 122, 125). Where a new State is created out of State territory, it may be formed by separation of territory from a State, or by the union of two or more States, or by the union of parts of two or more States, but only with the consent of the Parliament of any State affected (s. 124). Upon the establishment of a new State the Commonwealth Parliament may make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit (s. 121). The Parliament is not restricted by the provisions with respect to the minimum representation of original States in the House of Representatives, or the equal representation of original States in the Senate, and apparently it might even depart, in the case of new States, from the principle in section 24 that representation in the House of Representatives is to be proportionate to population. There are special provisions in section 123 with respect to the alteration of the limits of a State. The section is apparently intended to cover cases other than those contemplated in sections 121 and 124, and not to restrict the powers conferred by those sections, but its effect is not quite clear.

Before Federation the boundaries of New South Wales, Victoria, South Australia, Queensland, Western Australia and Tasmania, as well as of certain other self-governing colonies named in the schedule to the *Colonial Boundaries Act*, 1895, might be altered under the provisions of that Act by Her Majesty the Queen by order-in-council or by letters patent, "provided that the consent of a self-governing colony shall be required for the alteration of the boundaries thereof". After the passing of the Commonwealth of Australia Constitution Act, the *Colonial Boundaries Act*, 1895, was not to apply to any colony which became a State of the Commonwealth (covering clause 8), as the Constitution made its own provisions for the alteration of the boundaries of States and the creation of new States.

Alteration of the Constitution.

A distinction is to be drawn for some purposes, including that of alteration, between covering clauses 1-8, under which the Commonwealth was established and effect given to the Constitution, and covering clause 9, which embodies in the Act the provisions of the Constitution. The

powers of alteration contained in the Constitution do not extend to covering clauses 1-8, and their provisions, so far as they remain in force, can only be altered by the British Parliament (*Colonial Laws Validity Act,* 1865, s. 2). The Constitution expressly left a number of matters to the decision of the Federal Parliament (ss. 7, 8, 9, 14, 16, 49, 50, 71, 73, 74, 76, 77, 78, 79, 94, 96, 101, 102, 112), and many provisions of the Constitution only remain in force "until the Parliament otherwise provides" (ss. 3, 7, 10, 22, 24, 27, 29, 30, 31, 34, 38, 46, 47, 48, 65, 66, 67, 87, 93, 97, 108). All these provisions, though some in part only, may be changed by the Commonwealth Parliament without formally altering the Constitution. Where a provision of the Constitution cannot be changed in this way, it may be altered by the method prescribed in section 128. The provisions of that section are discussed in section xxi of this report. Here it may be stated broadly that the Constitution may be altered by a bill which has been passed by an absolute majority of each House, or in certain circumstances by an absolute majority of one House, and which on submission to the electors by referendum has been approved by the requisite majorities in four States and in the Commonwealth. In the case, however, of certain alterations, approval in the State or States affected is also required.

There have been three alterations of the Constitution. By *Constitution Alteration (Senate Elections)* 1906 the term of service of a Senator is to begin on the first day of July following his election, except where there is a dissolution of the Senate, when it is to begin on the first day of July preceding his election. The necessary amendments for this purpose are made in section 13 of the Constitution. By *Constitution Alteration (State Debts)* 1909 the words restricting the power of the Commonwealth Parliament to taking over public debts of the States "existing at the establishment of the Commonwealth" are omitted from section 105 of the Constitution. By *Constitution Alteration (State Debts)* 1928 the Commonwealth is empowered to make agreements with the States with respect to the public debts of the States, and with respect to borrowing by the States or by the Commonwealth or by the Commonwealth for the States.

The Constitution as the pact of union and as an instrument of government.

The Constitution has two aspects and serves a two-fold purpose. It is the pact of union, and an instrument of government (the *Sugar Company's* case, 1914 A.C. at p. 156, 17 C.L.R. at p. 655; the *Engineers'* case, 28 C.L.R. at p. 142; the *Union Label* case, 6 C.L.R. at p. 533). As regards the government of the States it does not do much more than provide for the continuance of the Constitution of each State subject to the changes involved in the terms of union (s. 106). As regards the central government it is not a detailed code—the intention "is rather to outline principles than to engrave details" (*State of Tasmania* v. *Commonwealth,* 1 C.L.R. at pp. 338, 348, *Jumbunna Coal Mine* v. *Victorian Coal Miners' Association,* 6 C.L.R. at p. 356), and it leaves the Commonwealth Parliament to complete the scheme in accordance with those principles (cf. ss. 7, 8, 9, 29, 30, 31, 65, 66, 67, 71, 72, 73, 74, 76, 77).

The relations of Federal and State Authorities to individuals.

The Constitution does not attempt, except to a very limited extent, to define the relations of either Federal or State authorities to individuals. The one clear exception is in regard to religion. The Commonwealth is not to make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test is to be required as a qualification for any office or public trust under the Commonwealth (s. 116). Section 41, under which an adult person who has or acquires a right to vote under a State franchise is not to be excluded from the Commonwealth franchise, applies only while that right continues, and its operation may have been limited to the state of affairs existing in the initial stages of the Commonwealth (evidence, p. 102). Section 80 merely ensures that where an offence is made triable on indictment, the trial shall be by jury (*R.* v. *Bernasconi,* 19 C.L.R. at p. 637; *ex parte Carrigan and Brown,* 41 C.L.R. 128). Section 92 is restricted to interference with freedom of trade, commerce, and intercourse among the States (*James* v. *South Australia,* 40 C.L.R. at p. 41). Section 117, under which a British subject, resident in any State, is not to be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a British resident in such other State, applies only where the disability or discrimination is based solely on residence in another State (*Davies and Jones* v. *State of Western Australia,* 2 C.L.R. at p. 47). Except so far as these sections, or some of them, may be regarded as being in the nature of the "guarantees" which are to be found in other written constitutions, the Constitution does not aim at protecting the people of the Commonwealth or the States against the exercise of legislative powers. It resembles the American Constitution in the principle adopted for the distribution of powers between the Federal and State Parliaments, but it differs from the American Constitution in refraining from prohibitions designed to prevent the misuse of powers, and addressed to both Federal and State Parliaments.

The interpretation of the Constitution.

The main principles by which the High Court will now be guided in interpreting the Constitution are those which are stated in the *Engineers'* case (28 C.L.R. 129), and which appear to stress the fact that the Constitution was enacted by a British statute rather than its origin and nature as a federal compact under which communities formerly independent of each other were to continue to exercise powers of self-government within their respective areas, while at the same time the authority of the central government, within its sphere, was to extend throughout those areas (*Commonwealth* v. *Colonial Combing Spinning and Weaving Co. Ltd.* 31 C.L.R. at pp. 439-441). In applying the rules of construction applicable to British statutes the Court will discard any doctrine of mutual non-interference formulated in its earlier judgments, or in the decisions or dicta of the American courts.

IV. THE COMMONWEALTH, THE STATES AND THE TERRITORIES.

The Commonwealth.

The Commonwealth of Australia Constitution Act did not merely create new governmental machinery in Australia. While the States continued as self-governing communities subject to the Constitution, a new self-governing community, formed by the union of the people of the six States, came into existence. "By the Act a new State or nation was created, armed with paramount power not only to settle the more important internal affairs relating to the common interests of the united people, but also to deal with all political matters arising between them and any other part of the Empire or (through His Majesty's Government) with any foreign power. That appears to me the obvious meaning of sec. iii. of the Act, which declares that on and after a day appointed by proclamation the people . . . . shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. On that day, Australia became a single entity and no longer six separate States in the family of nations under the British Crown, and the external responsibility of Australia . . . . vested immediately in the Commonwealth, which was armed with the paramount power necessary to discharge it" (*see* despatch from the Secretary of State in 1903, *Parliamentary Papers (Commonwealth)* 1903, p. 1164; cited in the *Constitution of the Commonwealth,* Harrison Moore, 2nd edn., p. 72).

The Parliament of this "new State or nation" may make laws under the Constitution which will bind the people of every State, and every part of the Commonwealth (covering clause 5). Whatever may be the precise meaning of "part of the Commonwealth" (*cf. Buchanan* v. *The Commonwealth,* 16 C.L.R. at p. 330), or the difference between the powers of the Commonwealth Parliament to legislate for the Commonwealth, including the States, and its powers to legislate for the Territories which have been acquired as "dependencies" under section 122 of the Constitution, that Parliament may make laws which will operate throughout the areas of the States and the Territories.

The area within Australia.

The area of the Commonwealth, including the six States, the Northern Territory, and the Federal Capital Territory, but not including the Territories outside Australia, comprises in all about 2,974,581 square miles, of which the mainland alone contains about 2,948,366 square miles. Australia is therefore slightly less in area than the United States, four-fifths of the area of Canada, and more than three-fourths of the area of Europe. Of this area about five-thirteenths, or 1,149,320 square miles, are situated within the tropical zone. This tropical area is situated within the States of Queensland and Western Australia and within the Northern Territory. Of the State of Queensland 359,000 square miles are within the tropical zone, and 311,000 within the temperate zone; of the State of Western Australia 364,000 square miles are within the tropical zone, and 611,920 square miles

within the temperate zone. Of the Northern Territory 426,320 square miles are within the tropical zone, and 97,300 square miles within the temperate zone. No portion of any other State is within the tropical zone.

The States.

The States differ greatly in area. The area of New South Wales is, in square miles, 309,432; Victoria, 87,884; Queensland, 670,500; South Australia, 380,070; Western Australia, 975,920; Tasmania, 26,215.

The States also differ widely in climate and rainfall. The following table extracted from the *Commonwealth Year-Book* for 1928 (p. 43) illustrates these diversities—

AVERAGE ANNUAL RAINFALL DISTRIBUTION.

Average Annual Rainfall.	New South Wales.(a)	Victoria.	Queensland.	South Australia.	Northern Territory.	Western Australia.	Tasmania (b)	Total (b)
	sq. miles.	sq. miles.	sq. miles.	sq. miles.	sq. miles.	sq. miles.	sq. miles.	sq. miles.
Under 10 inches	48.749	Nil	80.496	310,660	140 500	486,952	Nil	1,067,357
10 15 inches ..	78 454	19 270	81 549	36,460	132.780	255,092	Nil	603.605
15-20 nches ..	55,762	13,492	111,833	19.940	63.026	94,101	304	358 458
20-25 inches ..	45.140	14.170	143 610	8,620	49.157	44,340	3,844	308.881
25-30 inches ..	30.539	15,.79	99.895	3,258	41,608	31,990	3.016	225.885
30-40 inches ..	33.557	14,450	61 963	1,036	37,642	59.520	5,027	213,195
Over 40 inches	18,171	10,923	91,154	96	58,907	3,925	11,247	194.423
Total Area ..	310,372	87,884	670.500	380,070	523 620	975,920	23,438	2,971,804

(a) Including Federal Capital Territory. (b) Over an area of 2,777 square miles no records are available.

From the same source, page 44, it appears that in the extreme north nearly the whole of the rainfall occurs in the summer months, while little or no rain falls during the winter; in the south-west, on the other hand, the summer months are dry and the winter months are very wet.

The estimated population of Australia on the 31st December, 1928, was 6,336,786, divided as follows:—New South Wales, 2,445,280; Victoria, 1,760,964; Queensland, 916,689; South Australia, 579,348; Western Australia, 405,873; Tasmania, 216,563; Northern Territory, 3,982; Federal Capital Territory, 8,087.

Of the population of New South Wales, it is estimated that on 31st December, 1928, 1,127,470 lived in Sydney and suburbs, and 102,550 in Newcastle and suburbs; of the population of Victoria, 1,000,000 lived in Melbourne and suburbs; and of the population of South Australia, 330,217 lived in Adelaide, the percentages of population within the capital cities in these three States being respectively 46.11, 56.80, and 57.00. In Western Australia the corresponding percentage is 48.36; in Queensland, 33.66, and in Tasmania, 26.20, the percentage of the total population of Australia living within the capital cities being on that date 47.65.

The following table supplied by the Commonwealth Bureau of Census and Statistics shows the average number of persons employed in factories in each State for the years 1922-23 to 1927-28, the percentage of the Australian total so employed in each State, and the number per 10,000 in each State over the same series of years.

FACTORIES—EMPLOYMENT, 1922-23 TO 1927-28.

Year.	New South Wales.	Victoria.	Queensland.	South Australia.	Western Australia.	Tasmania.	Australia.
			AVERAGE NUMBER.				
1922–23 ..	152,266	152,625	43,403	34,695	19,097	10,324	412,410
1923–24 ..	159,674	156,162	44,948	37,275	19,712	12,219	429,990
1924–25 ..	165,760	154,158	48,922	38,353	21,758	10,998	439,949
1925–26 ..	174,101	152,959	50,496	40,051	22,142	11,171	450,920
1926–27 ..	183,193	161,639	48,133	42,164	20,424	11,694	467,247
1927–28 ..	182,659	160,355	(a)48,000	40,045	21,313	11,136	(a)463,508
			PERCENTAGE ON AUSTRALIAN TOTAL.				
1922–23 ..	36.92	37.01	10.53	8.41	4.63	2.50	100.00
1923–24 ..	37.13	36.32	10.45	8.67	4.59	2.84	100.00
1924–25 ..	37.68	35.04	11.12	8.72	4.94	2.50	100.00
1925–26 ..	38.61	33.92	11.20	8.88	4.91	2.48	100 00
1926–27 ..	39.21	34.60	10.30	9.02	4.37	2.50	100 00
1927–28 ..	39.40	34.60	(a)10.36	8.64	4.60	2.40	100.00
			PER 10,000 OF POPULATION.				
1922–23 ..	701	960	556	676	562	481	734
1923–24 ..	723	961	554	710	566	557	748
1924–25 ..	735	930	586	712	598	505	749
1925–26 ..	757	908	586	726	595	515	753
1926–27 ..	780	944	546	744	539	545	765
1927–28 ..	761	921	(a)534	696	543	516	(a) 743

(a) Estimated—subject to revision.

The following table taken from the *Commonwealth Year-Book* 1928, (p. 919) shows the distribution of the population within the States according to occupations on 4th April, 1921, the date of the last Commonwealth Census:—

POPULATION—OCCUPATIONS, CENSUS OF 4TH APRIL, 1921, (EXCLUSIVE OF FULL-BLOOD ABORIGINALS).

Occupation.	States						Territories.		Australia.
	New South Wales.	Victoria.	Queensland.	South Australia.	Western Australia.	Tasmania.	Northern.	Fed. Cap.	
Class. I. Professional..	78,004	60,732	26,081	15,898	13,492	6,957	165	557	201,887
II. Domestic ..	81 858	58,291	28,818	19,660	14,145	7,306	213	71	210,382
III. Commercial..	139,044	108,190	43,149	32,936	21,959	10,263	190	36	355,767
IV. Transport and Communication ..	84,719	53,445	29,833	19,507	14,321	6,085	270	42	208,222
V Industria ..	285,665	234,829	85 623	63,640	32 794	22,603	457	205	725,816
VI Primary Producers ..	208,936	147,514	109,719	52,658	49,399	29,911	1,298	315	599,750
VII. Independent	8 099	7,691	2,025	1,226	815	810	1	..	20,667
Total Breadwinners..	886,325	670,692	325,248	205,525	146,926	83,935	2,594	1,226	2,322,471
VIII. Dependants..	1,214,046	860,588	430,724	289,635	185 806	129 845	1,273	1,346	3,113,263
Total ..	2,100,371	1,531,280	755 972	495,160	332,732	213,780	3,867	2,572	5,435,734

The Territories.

Of the Territories, governed wholly or in part by the Commonwealth, four are outside Australia. Of these, two, Papua and the Mandated Territory of New Guinea, are largely undeveloped and incompletely explored. Papua and New Guinea are wholly within the tropics. Papua has a total area of about 90,540 square miles, of which plantations occupy about 61,370 acres. It has a white population of 1,428 and a native population officially estimated at 275,000, of whom approximately 7,500 are employed under contract. The Mandated Territory has an area of approximately 91,000 square miles, of which 423,175 acres are occupied by plantations, and of this area 195,538 acres have been planted. It has a white population of 2,300, an Asiatic population of about 1,700, and a native population roughly estimated at 435,000, of whom 28,253 were on the 30th June, 1928, employed as indentured labourers. The Island of Nauru had, on the 1st April, 1928, a population of 131 Europeans, 1,051 Chinese, and 1,297 Nauruans. The population of Norfolk Island on the 30th June, 1928, was 902. The amount expended by the Commonwealth in the year 1927-1928 on territories outside Australia was £76,436, exclusive of £52,051 for mail services.

V.—THE GOVERNMENT OF THE COMMONWEALTH.

The Establishment of the Commonwealth.

The Commonwealth of Australia Constitution Act received the royal assent on the 9th July, 1900. By section 3 of this Act it was provided that it should be lawful for the Queen with the advice of the Privy Council to declare by proclamation that on and after the day therein appointed, not being less than one year after the passing of the Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty was satisfied that the people of Western Australia had agreed thereto, of Western Australia, should be united in a Federal Commonwealth under the name of the Commonwealth of Australia. The proclamation authorized by this section was issued on the 17th September, 1900, the people of Western Australia having previously agreed thereto, and thereby the Commonwealth was established as from the 1st January, 1901.

On the 29th October, 1900, a Commission was issued appointing the Right Honorable the Earl of Hopetoun the first Governor-General of the Commonwealth of Australia.

Immediately after the Commonwealth was established the Departments of Trade and Customs were taken over.

The first administration of the Commonwealth took office on the 1st January, 1901, there being eight Ministers holding portfolios, and one without a portfolio.

The first Executive Council was summoned by the Governor-General in accordance with section 62 of the Constitution.

The Governor-General with the advice of the Federal Executive Council then established seven Departments of State, and appointed officers to administer them in accordance with section 64 of the Constitution.

The notifications of the above-mentioned executive acts were signed by Sir Edmund Barton, who had formed the first Federal Ministry, and the seven officers appointed to the seven departments of State were the first Ministers of State for the Commonwealth, and with two other Ministers constituted the first Federal Ministry.

Of the four departments of the Public Service in each State, the transfer of which to the Commonwealth the Governor-General was authorized to bring about by proclamation, posts, telegraphs, and telephones and the departments of defence in each of the States were transferred on the 1st March, 1901. The remaining two departments mentioned in section 69 have not been taken over, because it was found that in the States there were not separate departments exactly corresponding to the terms used in the Constitution—(*a*) "lighthouses, lightships, beacons, and buoys"; and (*b*) "quarantine." It followed that the power of legislating for posts, telegraphs, and telephones was, since 1st March, 1901, exclusively a Commonwealth power, whereas the the States retained the concurrent power of legislating for lighthouses, lightships, beacons and buoys, and quarantine, except in so far as their legislation might be inconsistent with the law of the Commonwealth.

Upon the passing of departments to the Commonwealth the officers of the transferred departments became subject to the executive government of the Commonwealth, with pension rights against the

Commonwealth, in respect of the whole of their respective periods of service, the Commonwealth having a right to claim from the States that proportion of the pension payable, which the period of each officer's service with the State bore to his whole period of service.

The first Parliament of the Commonwealth was summoned by proclamation, dated the 29th April, 1901, and was opened on the 9th May, 1901. The House of Representatives was composed of representatives of the States in the numbers prescribed by section 26 of the Commonwealth Constitution, and was elected in accordance with laws passed by the States.

The Senate was elected in pursuance of writs issued by the Governors of the respective States, and in accordance with laws passed by the States.

The Imposition of Uniform Duties of Customs.

By the Customs Tariff 1902 it was enacted that the time of the imposition of uniform duties of Customs was the eighth day of October, 1901, at four o'clock in the afternoon. Until the date and time mentioned the tariffs enforced and collected by the Commonwealth had been those enacted by the States before Federation, and goods imported into any State on passing thence into another State became liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of those goods on their importation into the Commonwealth, each State being debited with expenditure incurred in that State, and with a portion of the whole expenditure of the Commonwealth. The object of these provisions was to prevent goods, whatever their ultimate destination, from being attracted to that State which imposed the lowest duties on imports. The provisions did not apply to goods imported into Australia after the imposition of uniform duties of customs and excise.

After the imposition of uniform duties of customs and excise, the provisions of section 92 of the Constitution came into force, whereby it was provided that trade commerce and intercourse among the States should be absolutely free, and the book-keeping period began whereby each State was credited with duties of customs and excise on goods consumed within its borders, rather than on goods imported into it or manufactured within its borders.

The power of the Commonwealth to impose duties of customs and excise, and, subject to the qualifications in favour of the States contained in section 91 of the Constitution, to grant bounties on the production or export of goods, thereupon became exclusive, and all laws passed by the States relating to such duties or bounties ceased to have effect, subject to the proviso that any grant of or agreement for a bounty made prior to the 30th June, 1898, should not be affected.

Departments of State, and other Offices and Departments.

The seven departments of State established on the 1st January, 1901, were the following:—The Department of External Affairs, the Attorney-General's Department, the Department of Home Affairs, the Department of the Treasury, the Department of Trade and Customs, the Department of Defence, and the Postmaster-General's Department.

In addition to making provision for the transferred departments, the Parliament in 1901 provided for the appointment of an Auditor-General and for the establishment of trust funds.

Subsequently other departments were established and officers appointed under the authority conferred on the Governor-General in Council by section 64 of the Constitution, or by the exercise of the powers of legislation conferred on the Parliament by sections 51 and 52. The following departments were created by executive minutes, and Ministers of State were appointed to administer them:—The Prime Minister's Department, 1st July, 1911; the Department of the Navy, 12th July, 1915; the Repatriation Department, 28th September, 1917; the Department of Health, 7th March, 1921; the Department of Markets and Migration, 16th January, 1925; and the Department of Industry, 10th December, 1928.

Of the departments established on the 1st January, 1901, the Department of External Affairs was re-named as from the 14th November, 1916, when it became the Home and Territories Department, and some of its functions were taken over by the Prime Minister's Department; and the Department of Home Affairs was re-named as from the 14th November, 1916, the Department of Works and Railways.

On the 21st December, 1921, the present Department of External Affairs was established, and the Department of Defence took the place of the Departments of Defence and of the Navy existing on that date.

The Department of Markets and Migration was re-named as from the 19th January, 1928, the Department of Markets, and, as from 10th December, 1928, the Department of Markets and Transport.

The Home and Territories Department was re-named as from the 10th December, 1928, the Department of Home Affairs.

The Departments as at present established, set out in the order in which they have been created or re-named, are the following:—

- the Department of the Treasury;
- the Attorney-General's Department;
- the Postmaster-General's Department;
- the Department of Defence;
- the Department of Trade and Customs;
- the Prime Minister's Department;
- the Department of External Affairs;
- the Department of Works and Railways;
- the Department of Repatriation;
- the Department of Health;
- the Department of Home Affairs;
- the Department of Markets and Transport;
- the Department of Industry.

The Department of Works and Railways is now in fact called the Department of Works, though in view of certain statutory references to the Minister for Works and Railways, the Minister administering the department retains the title of Minister for Works and Railways.

In some instances more than one department is administered by the same Minister.

In the exercise of powers of legislation conferred on it by sections 51 and 52, the Parliament has established offices or departments other than Departments of State. A Commissioner of Patents was appointed in 1903, and the same officer was appointed Registrar of Trade-marks and Copyrights in 1905. Subsequently to the passing by the Commonwealth Parliament of the Acts relating to these subjects, the corresponding State departments were taken over by the Commonwealth. A department of Census and Statistics was established in 1905, but did not supersede the State departments, except by subsequent agreement between the Commonwealth and an individual State. The control of all coastal lighthouses, beacons, and buoys was assumed by the Commonwealth in 1915, and was placed under an officer who was directly responsible to the Comptroller-General of Customs. From 1st July, 1927, the Commonwealth Lighthouse Service was amalgamated with the Commonwealth Navigation Service, to constitute the Marine Branch of the Department of Trade and Customs.

The Tariff Board was established in 1921, to assist the Minister in the administration of matters relating to trade and customs.

The Development and Migration Commission was established in 1926, to inquire into and deal with proposals for the distribution of loan moneys under the Migration Agreement with the Imperial Government, and for other purposes.

An Inspector-General of Bankruptcy was appointed in 1927, for the purpose of supervising the administration of the *Bankruptcy Act* 1924-1928.

Among the bodies or councils of which the appointment cannot be traced directly to any of the powers enumerated in sections 51 and 52, are the Institute of Science and Industry and the Council for Scientific and Industrial Research.

The High Court of Australia.

The High Court was established on the 5th October, 1903, with three justices. Two additional justices were appointed in the month of October, 1906, and the number of justices was increased to seven in the months of February and March, 1913.

The principal registry of the High Court is to be at the seat of government, but the High Court has held, and continues to hold sittings in each of the capital cities of the States, thereby bringing one of the chief organs of the Federal Government, at intervals, into the midst of the citizens of each State.

The Inter-State Commission.

The Inter-State Commission was established by the *Inter-State Commission Act* 1912, a bill for the appointment of the Commission introduced into the Senate in 1909 having been abandoned, but at the present time there are no Commissioners.

The Parliament.

In exercise of the powers to legislate on matters affecting itself the Commonwealth Parliament has, *inter alia,* made laws with respect to the qualification of electors, the qualification of members, the electorates for the House of Representatives, the filling of periodic and casual vacancies in the Senate, the system of voting, compulsory enrolment, and compulsory voting.

The Franchise.

Under sections 8 and 30 of the Constitution the franchise is to be the same for both Houses of the Commonwealth Parliament, and no person is to have more than one vote. Under section 41 of the Constitution no adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State is, while the right continues, to be prevented by any law of the Commonwealth from voting at elections of either House of the Parliament of the Commonwealth.

Section 41 has not been interpreted by the High Court—*Muramats'* case (32 C.L.R. 500) was decided on another ground—and the meaning of the section is not free from doubt (*see Quick and Garran,* pp. 484-487; *Harrison Moore,* 1st edn., pp. 108-109; 2nd edn., pp. 126-127). There are no words in the Constitution which expressly provide that the section is to have only a limited duration, *e.g.,* that is to apply only to persons who had a right to vote under a State franchise at the time when the State laws which governed the first elections after Federation were superseded by the enactment of a uniform franchise throughout the Commonwealth (*cf.* s. 30, and the fourth paragraph of s. 128). In practice the section has been interpreted, by the instructions issued to Electoral Registrars, as meaning that the right to vote under a State franchise "must have been acquired by lawful enrolment as an elector for the more numerous House of the Parliament of the State prior to the passing of the *Commonwealth Franchise Act* 1902, and that in order to be entitled to Commonwealth enrolment the elector concerned must have continuously retained his right to such State enrolment". It may be noted in regard to the franchise under the *Commonwealth Electoral Act* 1918-1928 that the only effect of section 41 of the Constitution is to preserve the right of a person who but for that section would be disqualified as an aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific except New Zealand.

By the *Commonwealth Franchise Act* 1902, section 3, it was provided that, subject to certain disqualifications, the following persons should be eligible to vote at any election for either House of Parliament, namely, all persons not under twenty-one years of age, whether male or female, married or unmarried—(*a*) who have lived in Australia for six months continuously, and (*b*) who are natural born or naturalized subjects of the King, and (*c*) whose names are on the electoral roll for any electoral division.

By section 4 of that Act the following persons were disqualified:—(1) persons of unsound mind; (2) persons attainted of treason; and (3) persons convicted of any offence, and either under sentence or subject to be sentenced for any offence punishable by the law of any part of the King's dominions by imprisonment for one year or longer; and (4) any aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific, except New Zealand, unless he is entitled under section 41 of the Constitution.

Women were admitted to the franchise in 1894 in South Australia, in 1899 in Western Australia, in 1902 in New South Wales, in 1903 in Tasmania, in 1905 in Queensland, and in 1908 in Victoria.

The *Commonwealth Franchise Act* 1902 was repealed by the *Commonwealth Electoral Act* 1919 (s. 3). Adult suffrage was continued by section 39 of the latter Act, under which, subject to certain disqualifications, all persons not under twenty-one years of age, whether male or female, married or unmarried, who have lived in Australia for six months continuously, and are natural-born or naturalized subjects of the King, are to be entitled to enrolment.

In addition, the following persons were to be entitled to enrolment during the continuance of the then present state of war and for a period of three years thereafter, namely, all persons who were or had been members of the Forces within the meaning of the *Commonwealth Electoral (War-time) Act* 1917, and who had lived in Australia for six months continuously, and were natural-born or naturalized subjects of the King.

By sub-sections (4) and (5) of the same section (s. 39), the disqualifications of section 3 of the *Commonwealth Franchise Act* 1902 were re-enacted.

By section 2 of the *Commonwealth Electoral Act* 1925 two further exceptions were made to the provision which disqualifies aboriginal natives of Australia, Asia, Africa, and the Islands of the Pacific (except New Zealand). Under these exceptions such a person may be entitled to have his name placed on or retained on the roll and to vote, not only where he is so entitled under section 41 of the Constitution, but also (*a*) if he is a native of British India, or (*b*) if he is a person to whom a certificate of naturalization has been issued under a law of the Commonwealth or of a State, and that certificate is still in force, or if he is a person who obtained British nationality by virtue of the issue of any such certificate.

By the *Commonwealth Electoral (War-time) Act* 1917-1919 provision was made for the enrolment of members of the Commonwealth Forces under the age of twenty-one, and for the voting of members of the Forces on active service. By the *Commonwealth Electoral (War-time) Act* 1917 it was also enacted that with certain specified exceptions every naturalized British subject who was born in an enemy country should be disqualified from voting. The exceptions included (*a*) any member of the Forces serving outside Australia; (*b*) any person who was or had been a member of the Forces, or had applied for enlistment and been rejected, or was a parent, or the wife, brother, or sister of a person who had been a member of the Forces, or had been rejected; (*c*) any person who had been, at any time during the then present war, a member of the Parliament of the Commonwealth or of a State; (*d*) any person who satisfied the presiding officer that he was a Christian, and either a Syrian or an Armenian. By section 2 it was enacted that this Act should apply in relation to elections for the Senate and general elections for the House of Representatives held during the then present war, or within six months thereafter. This Act was repealed by the *Commonwealth Electoral (War-time) Repeal Act* 1920.

The Commonwealth Parliament is the only Parliament in Australia of which both Houses are elected by universal adult suffrage. Queensland, however, has one House only.

Qualification of Members of Parliament.

By section 95 of the *Commonwealth Electoral Act* 1902 it was enacted that to entitle a person to be nominated as a senator or member of the House of Representatives, he must be qualified under the Constitution to be elected as a senator or member of the House of Representatives. The qualifications fixed by the Constitution are set out in section 34, and the disqualifications in section 43 and 44 of the Constitution. To these disqualifications the Parliament of the Commonwealth has added, by section 96 of the *Commonwealth Electoral Act* 1902, that "no person who is at the date of nomination, or who was at any time within fourteen days prior to the date of nomination a member of the Parliament of a State shall be capable of being nominated as a senator or as a member of the House of Representatives."

Apparently the Constitution contemplated that some persons would be members of both State and Commonwealth Parliaments, as Ministers for a State were expressly exempted from the provision disqualifying persons who hold an office of profit under the Crown (s. 44 of the Constitution), but States saw fit to disqualify members of the Commonwealth Parliament from being elected to the State Parliament, and the Commonwealth Parliament retaliated with section 96 of the *Commonwealth Electoral Act* 1902. The provisions of that section are re-enacted in sections 69 and 70 of the *Commonwealth Electoral Act* 1918. It was suggested before the Commission that the principle of these disqualifications is open to criticism, as the electors should have the right to elect, if they see fit, a member of a State Parliament to the Commonwealth Parliament, or a member of the Commonwealth Parliament to a State Parliament.

The qualifications of a member of the Commonwealth Parliament are more fully set out in section 4 of the *Commonwealth Electoral Act* 1925. He must (*a*) be of the full age of twenty-one years; (*b*) be a subject of the King, either natural born or for at least five years naturalized under a law of the United Kingdom or of the Commonwealth; (*c*) have been for three years at least a resident within the limits of the Commonwealth, as existing at the time when he is chosen; and (*d*) be either—(i) an elector entitled to vote at the election of a member of the House of Representatives; (ii) a person qualified to become such elector; or (iii) a person who lives in the Territory for the Seat of Government and has so lived for a period of one month.

Section 70 of the *Commonwealth Electoral Act* 1918, providing for the disqualification of members of the State Parliament, was re-stated by section 2 of the *Commonwealth Electoral Act* 1921, with the addition of a provision to the effect that "no person who has resigned from the Parliament of a State and has the right under the law of the State if not elected to the Parliament of the Commonwealth to be re-elected to the Parliament of the State without the holding of a poll" shall be capable of being nominated as a senator or as a member of the House of Representatives.

This provision was inserted to frustrate an attempt made by State Parliaments to evade section 70 of the *Commonwealth Electoral Act* 1918.

Section 44 (iv) of the Constitution provides that any person who "holds any office of profit under the Crown shall be incapable of being chosen or of sitting as a senator or member of the House of Representatives." Witnesses before the Commission urged that this provision imposed a hardship on members of the civil service. Some urged that it should be amended either by allowing a civil servant to contest a seat and to postpone his resignation until after his election, or by eliminating the sub-section altogether. Others urged that a civil servant should be allowed to return to the service at the end of his parliamentary term.

Electorates for the House of Representatives.

By the *Commonwealth Electoral Act* 1902 provision was made for the election of members of the House of Representatives by single-member constituencies, each State being distributed into a number of electoral divisions corresponding with the number of members to be chosen in the State, and one member being chosen in each division (s. 12). This provision is now repeated in the *Commonwealth Electoral Act* 1918-1928, s. 15.

The Constitution itself provides by section 24 for the ascertainment of a quota for the purpose of arriving at the number of members to be chosen in each State, subject to a proviso for the minimum representation of original States. This quota is ascertained by dividing the number of the people of the Commonwealth by twice the number of senators. The number of members to be chosen in each State is then determined by dividing the number of people in the State by the quota, and if on the division there is a remainder greater than one half of the quota, one more member is to be chosen in that State. The machinery for giving effect to section 24 of the Constitution is provided by the *Representation Act* 1905. The population of the Commonwealth, and of each State, is to be ascertained at the times and in the manner prescribed by the Act, and the representation of the States may be adjusted once in every five years. In 1901 the population quota, that is, the quota ascertained by dividing the population of the Commonwealth by seventy-two, was 52,514; in 1906, 55,595; in 1912, 61,547; in 1922, 75,230; in 1927, 85,494.

At the time of the first election for the Commonwealth Parliament the number of members chosen in each State was:—New South Wales, twenty-six; Victoria, twenty-three; Queensland, nine; South Australia, seven; Western Australia, five; Tasmania, five. The number of members chosen in each State at the election in 1928 was:—New South Wales, twenty-eight; Victoria, twenty; Queensland, ten; South Australia, seven; Western Australia, five; Tasmania, five; Northern Territory, one. Tasmania would not be entitled to choose five members but for the provision in section 24 of the Constitution that in each original State five members at least shall be chosen. There was no need for an adjustment of the representation in 1926, but there may be need for an adjustment in 1931.

For the purpose of distributing each State into electorates it was enacted by the *Commonwealth Electoral Act* 1902 (s. 15, as amended by the Act No. 26 of 1905) that a quota should be ascertained by dividing the number of electors in the State by the number of members of the House of Representatives to be chosen therein. This provision is now repeated in the *Commonwealth Electoral Act* 1918-1928, s. 18.

The distribution of a State into electorates is made by three Distribution Commissioners appointed by the Governor-General, of whom one is to be the Chief Electoral Officer or an officer having similar qualifications, and another the Surveyor-General of the State or an officer having similar qualifications, if his services are obtainable. The Commissioners are directed to take into account (*a*) community or diversity of interest; (*b*) means of communication; (*c*) physical features; (*d*) existing boundaries of divisions and subdivisions; and (*e*) State electoral boundaries. Subject to due consideration being given to these matters the quota of electors is to be the basis for the distribution. The Commissioners may adopt a margin of allowance, to be used whenever necessary, but the quota is not to be departed from to a greater extent than one-fifth more or one-fifth less. The report of the Commissioners is to be laid before both Houses of Parliament, and if both Houses approve, the Governor-General may proclaim the electorates. If either House does not approve, the Minister may direct the Commissioners to propose a fresh distribution (*Commonwealth Electoral Act* 1918-1928, ss. 16-25).

A redistribution of the electorates in any State may be made (*a*) whenever an alteration is made in the number of members of the House of Representatives to be elected for the State; (*b*) whenever in one-fourth of the divisions of the State the number of the electors differs from a quota ascertained in the manner provided in the Commonwealth Electoral Act to a greater extent than one-fifth more or one-fifth less; and (*c*) at such other times as the Governor-General thinks fit (*Commonwealth Electoral Act* 1918-1928, s. 25).

There have been three redistributions since the establishment of the Commonwealth, in 1906, 1912, and 1922. In 1906 New South Wales was entitled to one more, and Victoria to one less, than its original number of members. In 1912 Victoria was entitled to one less, and Queensland to one more than in 1906. In 1922 Victoria was entitled to one less, and New South Wales to one more than in 1912. Redistributions were required accordingly. No use has yet been made of the provision under which the Governor-General may, if he thinks fit, direct a redistribution in cases other than those in which there has been a variation in the number of members for a State or in the number of electors in one-fourth of its divisions.

Enrolment and Voting.

Enrolment of electors was made compulsory by the *Commonwealth Electoral Act* 1911 (27th March, 1912), and voting was made compulsory by the *Commonwealth Electoral Act* 1924.

In 1901 the percentage of electors who exercised the franchise was 53.04 for the Senate, and 55.69 for the House of Representatives. In 1917 the percentage, being the highest at any election prior to 1925, was 77.69 for the Senate, and 78.3 for the House of Representatives. In 1922 the percentage was 57.95 for the Senate, and 59.36 for the House of Representatives. In 1925 the percentage was 91.31 for the Senate, and 91.39 for the House of Representatives. In 1928 the percentage was 93.61 for the Senate, and 93.64 for the House of Representatives.

The enrolment in each electoral division at the time of each redistribution in 1906, 1912, and 1922, was as follows [*Exhibit* 30]:—

NEW SOUTH WALES.

Division.	Enrolment 1903 election.	1906.		1912.		1922.	
		Before Redistribution.	As Redistributed.	Before Redistribution.	As Redistributed.	Before Redistribution.	As Redistributed.
Metropolitan Divisions.							
Barton (New Division)	..	..	..	..	..	..	40,499
Cook (New Division) ..	..	..	26,400	35,733	37,794	39,340	41,308
Dalley	34,361	32,783	27,620	38,765	37,753	39,089	42,349
East Sydney	35,018	31,113	27,994	35,428	38,049	37,730	43,130
Lang	38,896	37,549	25,986	47,353	37,822	51,496	41,004
Martin (New Division)	..	..	..	..	..	..	40,634
Nepean (New Division)	..	..	25,921	41,252	37,134	60,396	..
North Sydney ..	39,037	38,589	25,916	49,828	37,995	56,337	41,302
Parkes	36,855	36,804	26,363	46,274	37,959	72,439	40,450
Parramatta	28,038	37,906	26,339	39,851	37,428	63,055	*
Reid (New Division) ..	..	..	..	..	..	..	39,737
South Sydney ..	31,765	31,263	27,162	34,873	37,553	47,782	40,895
Warringah (New Division)	..	..	..	..	..	..	40,019
Wentworth	31,362	31,694	25,594	46,982	37,802	56,028	40,579
West Sydney ..	25,787	24,394	28,040	33,111	37,402	31,934	43,265
Extra-Metropolitan Divisions.							
Barrier	19,277	19,992	21,461	22,264	29,269	23,635	..
Bland	20,861	19,814	} ..	..	..	..	
Canobolas	20,256	20,083	} ..	..	..	..	
Calare (New Division)	..	..	24,040	33,092	31,307	31,035	37,588
Cowper	25,568	26,488	24,895	37,119	35,536	37,022	37,722
Darling	15,268	14,168	21,495	28,899	30,091	24,465	36,546
Eden-Monaro ..	22,330	21,147	22,412	22,712	31,278	28,667	38,311
Gwydir	22,360	22,032	23,732	34,338	33,606	30,140	37,559
Hume	22,219	21,464	23,233	27,884	31,422	33,143	37,604
Hunter	26,963	28,200	25,055	35,840	34,532	40,423	38,907
Illawarra	27,419	26,575	25,266	30,060	35,118	48,046	..
Macquarie	20,460	20,846	23,028	24,344	31,863	35,424	37,758
Newcastle	35,655	32,629	27,408	32,186	35,137	47,741	39,931
New England ..	26,759	26,484	24,444	31,416	32,618	32,067	38,487
Parramatta	..	..	..	..	..	..	39,956
Richmond	18,986	22,054	22,054	34,996	33,794	35,658	37,737
Riverina	18,163	15,993	22,318	33,030	32,107	33,737	36,831
Robertson	22,330	21,961	24,857	29,488	31,353	33,208	37,573
Werriwa	21,066	21,257	24,249	28,565	32,022	35,343	37,699
Total	687,049	673,282	673,282	935,744	935,744	1,105,380	1,105,380

	1906.	1912.	1922.
Quota	25,895 ..	34,657 ..	39,478
Limits—Maximum ..	31,074 ..	41,588 ..	47,373
Minimum	20,716 ..	27,726 ..	31,583

* Sub-Metropolitan.

Victoria.

Division.	Enrolment 1903 election	1906.		1912.		1922.	
		Before Redistribution.	As Redistributed.	Before Redistribution.	As Redistributed.	Before Redistribution.	As Redistributed.
Metropolitan Divisions.							
Balaclava	34,412	†	28,969	41,345	32,385	46,746	43,783
Batman	..	†	28,219	33,314	35,829	37,191	44.867
Bourke	34,921	†	28,753	45,031	34,423	57,045	44,605
Fawkner	..	†	31,348	42,962	35,453	39,972	44,810
Henty	..	†	..	..	32,537	67,452	43,913
Kooyong	39,359	†	30,014	41,695	34,335	53,811	45,749
Maribyrnong ..	..	†	30,244	42,155	34,095	51,427	43,550
Melbourne	26,753	†	29,506	34,055	36,758	34,280	47,659
Melbourne Ports ..	31,893	†	29,237	35,736	36,573	44,353	47,410
Northern Melbourne ..	35,542	†	..	..	..	..	..
Southern Melbourne ..	35,753	†	..	..	..	..	..
Yarra	37,199	†	28,180	28,575	37,014	40,140	47,633
Extra-Metropolitan Divisions.							
Ballaarat	30,281	†	28,342	25,891	36,011	32,874	40.316
Bendigo	25,320	†	28,616	29,354	34,957	30,050	41,196
Corangamite	23,849	†	27,738	30,042	34,612	34,913	39,144
Corinella	20,792	†	..	..	..	..	..
Corio	25,531	†	28,416	31,924	33.918	38,884	40,422
Echuca	20,221	†	27,387	29,794	34,796	34,501	39,883
Flinders	27,461	†	26,358	33,436	33,318	42,248	42,306
Gippsland	19,536	†	26,549	28,071	34,555	36,758	41,317
Grampians	21,734	†	26,236	27,709	35,397	29.458	..
Indi	19,228	†	27,541	28,460	33,895	30,982	38,071
Laanecoorie ..	19,954	†	26,175	23,544	..	..	..
Mernda	21,969	†	26,969	29,782	..	..	..
Moira	20,970	†	..	..	..	..	..
Wannon	23,103	†	26,120	28,117	33.758	34,385	39.823
Wimmera	16,691	†	25,509	36.609	32,482	38,314	39.327
Total ..	612,472	†	616,426	727,601	727,601	855,784	855,784
Quota		..	28,019	..	34,648	..	42,789
Limits—Maximum		..	33,623	..	41,578	..	51,347
Minimum ..		..	22,415	..	27,718	..	34,231

† Figures not shown in Committee's Report.

QUEENSLAND.

Division.	Enrolment 1903 election.	1906. Before Redistribution.	1906. As Redistributed.	1912. Before Redistribution.	1912. As Redistributed.	1922. Before Redistribution.	1922. As Redistributed.
Metropolitan Divisions.							
Brisbane	34,142	34,009	28,992	35,793	33,934	43,383	39,198
Lilley (New Division)	..	..	..	..	31,263	52,611	38,924
Oxley	31,326	31,694	28,867	38,605	31,679	49,762	42,206
Extra-Metropolitan Divisions.							
Capricornia	21,624	20,669	23,971	35,392	31,115	33,128	42,587
Darling Downs ..	24,155	25,927	27,326	37,548	32,890	37,231	40,263
Herbert	25,685	26,119	26,119	39,461	33,086	43,157	40,055
Kennedy	19,703	20,359	22,111	20,709	30,565	26,517	34,760
Maranoa	16,865	18,186	23,038	35,282	27,646	31,346	33,242
Moreton	27,267	28,216	28,053	36,418	32,750	39,783	39,436
Wide Bay	26,313	28,993	25,695	34,680	28,960	34,791	41,038
Total ..	227,080	234,172	234,172	313,888	313,888	391,709	391,709
Quota		..	26,019	..	31,388	..	39,171
Limits—Maximum		..	31,223	..	37,665	..	47,005
Minimum..		..	20,815	..	25,111	..	31,337

SOUTH AUSTRALIA.

(No Redistribution in 1906 or 1912.)

Division.	Enrolment 1903 election.	1906. Before Redistribution.	1906. As Redistributed.	1912. Before Redistribution.	1912. As Redistributed.	1922. Before Redistribution.	1922. As Redistributed.
Metropolitan Division.							
Adelaide	24,273	..	..	..	..	34,017	41,718
Boothby	25,199	..	..	..	..	49,539	38,487
Hindmarsh	24,446	..	..	..	..	52,835	41,658
Extra-Metropolitan Divisions.							
Angas	24,045	..	..	..	..	30,376	38,471
Barker	23,035	..	..	..	..	39,798	39,646
Grey	22,548	..	..	..	..	33,256	35,444
Wakefield	24,229	..	..	..	..	34,362	38,759
Total ..	167,775	..	..	..	..	274,183	274,183
Quota	..	..	..	..	..	39,169	
Limits—Maximum	..	..	..	..	..	47,003	
Minimum..	..	..	..	..	..	31,335	

Western Australia.

Division.	Enrolment 1903 election.	1906.		1912.		1922.	
		Before Redistribution.	As Redistributed.	Before Redistribution.	As Redistributed.	Before Redistribution.	As Redistributed.
Metropolitan Divisions.							
Fremantle	19,511	21,417	22,924	24,968	29,617	44,888	34,598
Perth	27,105	28,224	24,523	33,556	30,358	39,124	34,717
Extra-Metropolitan Divisions.							
Coolgardie	21,686	19,031	22,624	24,177	..	..	..
Dampier (New Division)	..	..	..	..	30,467	30,771	..
Forrest (New Division)	..	..	..	..	..	..	33,207
Kalgoorlie	23,208	22,173	22,173	20,255	31,103	18,527	32,272
Swan	25,432	25,354	23,955	48,997	30,408	33,785	32,301
Total ..	116,942	116,199	116,199	151,953	151,953	167,095	167,095

		1906		1912		1922
Quota	..	23,240	..	30,391	..	33,419
Limits—Maximum	..	27,888	..	36,469	..	40,103
Minimum ..	..	18,592	..	84,313	..	26,735

Tasmania.

(No Redistribution in 1906 or 1912.)

Division.	Enrolment 1903 election.	1906.		1912.		1922.	
		Before Redistribution.	As Redistributed.	Before Redistribution.	As Redistributed.	Before Redistribution.	As Redistributed.
Metropolitan Division.							
Denison	16,607	..	..	..	..	27,901	22,597
Extra-Metropolitan Divisions.							
Bass	17,571	..	..	..	..	22,660	21,254
Darwin	16,111	..	..	..	..	17,391	22,188
Franklin	16,261	..	..	..	..	22,849	20,957
Wilmot	15,718	..	..	..	..	17,817	21,622
Total ..	82,268	..	..	..	..	108,618	108,618

Quota	..	..	..	..	..	21,724
Limits—Maximum	..	..	..	..	..	26,069
Minimum ..	..	..	..	..	..	17,379

The following statement [*Exhibit* 25] shows in regard to each State, in 1901, 1906, 1912, 1922, and 1927—the population; the number of members of the House of Representatives; the electoral population; and the average number of electors in each division.

State.	1901.			1906 Redistribution.			1912 Redistribution.			1922 Redistribution.			1927.		
	Population.	Number of Members.	Average Number Electors per Division.	Population.	Number of Members.	Average Number Electors per Division.	Population.	Number of Members.	Average Number Electors per Division.	Population.	Number of Members.	Average Number Electors per Division.	Population.	Number of Members.	Average Number Electors per Division.
(*a*) ..	1,354,846	..	..	1,483,393	..	..	1,646,734	..	..	2,099,763	..	..	2,370,623	..	..
N.S.W.	..	26	12,677	..	27	24,666	..	27	34,657	..	28	39,478	..	28	46,055
(*b*) ..	329,615	..	..	665,978	..	..	935,744	..	..	1,105,380	..	..	1,289,534	..	..
(*a*) ..	1,201,070	..	..	1,214,098	..	..	1,315,551	..	..	1,531,529	..	..	1,726,445	..	..
Victoria ..	..	23	11,307	..	22	27,942	..	21	34,648	..	20	42,789	..	20	49,242
(*b*) ..	260,053	..	..	614,732	..	..	727,601	..	..	855,784	..	..	984,830	..	..
(*a*) ..	498,129	..	..	506,938	..	..	594,514	..	..	747,620	..	..	894,444	..	..
Queensland	..	9	11,682	..	9	25,370	..	10	31,388	..	10	39,171	..	10	44,112
(*b*) ..	105,144	..	..	228,326	..	..	313,888	..	..	391,709	..	..	441,122	..	..
(*a*) ..	363,157	..	..	372,768	..	..	408,558	..	..	495,336	..	..	570,900	..	..
Sth. Aust.	..	7	21,895	..	7	27,588	..	7	34,832	..	7	39,169	..	7	44,657
(*b*) ..	153,268	..	..	193,118	..	..	244,026	..	..	274,183	..	..	312,599	..	..
(*a*) ..	184,124	..	..	247,072	..	..	274,841	..	..	328,475	..	..	385,043	..	..
West. Aust.	..	5	18,208	..	5	23,050	..	5	30,391	..	5	33,419	..	5	38,701
(*b*) ..	91.043	..	..	115,254	..	..	151,953	..	..	167,095	..	..	193,504	..	..
(*a*) ..	172,475	..	..	178,627	..	..	191,211	..	..	213,877	..	..	208,179	..	..
Tasmania	..	5	7,774	..	5	18,042	..	5	21,349	..	5	21,724	..	5	21,855
(*b*) ..	38,870	..	..	90,209	..	..	106,746	..	..	108,618	..	..	109,275	..	..
(*a*) ..	3,773,801	..	..	4,002,893	..	..	4,431,409	..	..	5,416,600	..	..	6,155,634	..	..
Com'wth.	..	75	13,040	..	75	25,435	..	75	33,066	..	75	38,703	..	75	44,411
(*b*) ..	977,993	..	..	1.987.617	..	..	2.479.958	..	..	2,902,769	..	..	3,330,864	..	..

Population quota, i.e., Total Population divided by 72 (twice the number of Senators)	Year 1901.	Year 1906.	Year 1912.	Year 1922.	Year 1927.
	52.514 ..	55,595 ..	61,547 ..	75,230 ..	85,494

NOTE.—In the year 1901, women were not enfranchised in the States of New South Wales, Victoria, Queensland, and Tasmania.
(*a*) Total. (*b*) Electoral.

The area of the electoral divisions in December, 1922, the date of the last redistribution, was as follows [*Exhibit* 26] :—

I. New South Wales.

A. Metropolitan Divisions.

	Square Miles.
Barton	52.0
Cook	11.2
Dalley	4.0
East Sydney (exclusive of Lord Howe Island)	10.4
Lang	4.4
Martin	55.2
North Sydney	18.4
Parkes	10.0
Reid	63.2
South Sydney	14.8
Warringah	116.4
Wentworth	8.0
West Sydney	6.4
B. Extra-Metropolitan Divisions.	
Calare	12,185.0
Cowper	10,060.6
Darling	151,284.0
Eden-Monaro	17,586.0
Gwydir	32,665.0
Hume	10,624.0
Hunter	896.0
Macquarie	5,350.4
Newcastle	76.8
New England	15,667.2
Parramatta	435.2
Richmond	7,321.6
Riverina	24,651.0
Robertson	14,413.0
Werriwa	5,836.8
	309,427.0
Lord Howe Island	5.0
Total	309,432.0

II. Victoria.

A. Metropolitan Divisions.

	Square Miles.
Balaclava	7.5
Batman	21.9
Bourke	12.3
Fawkner	7.0
Henty	42.1
Kooyong	21.8
Maribyrnong	15.1
Melbourne	9.8
Melbourne Ports	10.4
Yarra	3.7

B. Extra-Metropolitan Divisions.

Ballaarat	2,102.4
Bendigo	3,371.0
Corangamite	8,461.0
Corio	2,461.0
Echuca	8,268.0
Flinders	1,923.0
Gippsland	16,408.0
Indi	10,715.0
Wannon	13,024.0
Wimmera	20,999.0
Total	87,884.0

III. Queensland.

	Square Miles.
Brisbane	45.6
Capricornia	57,889.0
Darling Downs	7,330.0
Herbert	72,565.0
Kennedy	294,985.0
Lilley	246.7
Maranoa	217,937.0
Moreton	3,438.7
Oxley	194.0
Wide Bay	15,869.0
Total	670,500.0

IV. South Australia.

	Square Miles.
Adelaide	12.8
Angas	7,672.8
Barker	18,822.6
Boothby	16.8
Grey	338,403.0
Hindmarsh	53.0
Wakefield	15,089.0
Total	380,070.0

V. Western Australia.

	Square Miles.
Forrest	40,220.0
Fremantle	79.5
Kalgoorlie	909,121.0
Perth	19.5
Swan	26,480.0
Total	975,920.0

VI. Tasmania.

	Square Miles.
Bass	3,347.0
Darwin	6,640.3
Denison	5.7
Franklin	6,100.0
Wilmot	10,122.0
Total	26,215.0

VII. Northern Territory.

	Square Miles.
Northern Territory	523,620.0

The number of electors in each electorate on the 30th September, 1927, was as follows [*Exhibit* 31] :—

Division.	Enrolment.	Division.	Enrolment.
State of New South Wales.		*State of Victoria.*	
Barton	59,304	Balaclava	54,183
Calare	40,955	Ballaarat	38,208
Cook	42,669	Batman	66,781
Cowper	38,987	Bendigo	39,000
Dalley	41,464	Bourke	56,576
Darling	40,039	Corangamite	40,675
East Sydney	38,822	Corio	49,546
Eden-Monaro	40,518	Echuca	41,542
Gwydir	38,737	Fawkner	45,288
Hume	41,176	Flinders	59,971
Hunter	49,846	Gippsland	44,127
Lang	45,006	Henty	70,997
Macquarie	39,192	Indi	39,369
Martin	58,201	Kooyong	62,156
Newcastle	50,753	Maribyrnong	52,952
New England	40,414	Melbourne	44,529
North Sydney	53,537	Melbourne Ports	45,978
Parkes	53,663	Wannon	41,512
Parramatta	54,762	Wimmera	47,858
Reid	60,852	Yarra	43,582
Richmond	41,665		
Riverina	43,830		
Robertson	40,808		
South Sydney	51,954		
Warringah	48,524		
Wentworth	53,346		
Werriwa	43,291		
West Sydney	37,219		
	1,289,534		984,830

The number of electors in each electorate on the 30th September, 1927, was as follows [*Exhibit* 31]—*continued.*

State of Queensland.

Division.	Enrolment.
Brisbane	41,155
Capricornia	46,370
Darling Downs	40,804
Herbert	52,252
Kennedy	30,795
Lilley	52,255
Maranoa	31,766
Moreton	46,536
Oxley	53,746
Wide Bay	45,443
	441,122

State of South Australia.

Division.	Enrolment.
Adelaide	43,763
Angas	48,498
Barker	46,808
Boothby	47,254
Grey	36,226
Hindmarsh	53,107
Wakefield	36,943
	312,599

State of Western Australia.

Division.	Enrolment.
Forrest	40,847
Fremantle	40,026
Kalgoorlie	28,463
Perth	38,540
Swan	45,628
	193,504

State of Tasmania.

Division.	Enrolment.
Franklin	22,623
Bass	21,577
Darwin	22,054
Denison	22,238
Wilmot	20,783
	109,275

State.	Summary for Commonwealth.
New South Wales	1,289,534
Victoria	984,830
Queensland	441,122
South Australia	312,599
Western Australia	193,504
Tasmania	109,275
	3,330,864

The Number of Members of the House of Representatives.

It was urged before the Commission that the number of members of the House of Representatives should be increased for various reasons, the main arguments being (*a*) that the electoral quota has very much increased since the number was fixed at 75; (*b*) that it is impossible for members of certain electorates of great size to understand properly the needs of their own constituents; (*c*) that owing to the small size of the State electorates, there are greater opportunities of expressing the point of view of the States than for expressing the point of view of the Commonwealth; (*d*) that a House of 75 is too small to avoid the risk of having an undesirably large proportion of members who support

a government attached to it as Ministers or Assistant Ministers, or in some way benefiting by government patronage, as, for instance, as members of the Public Works Committee, or the Public Accounts Committee; and (*e*) that the risk of having such a proportion is likely to become more serious as the business of the Commonwealth becomes more complicated, and the necessity arises of appointing a large number of Assistant Ministers. An increase in the number of members of the House of Representatives was recommended by the Chairman of the royal commission on the finances of Western Australia.

The Duration of the House of Representatives.

It was urged before the Commission that the term of the House of Representatives should be extended to four years, five years, or six years, from three as at present fixed by section 28 of the Constitution. An extension to five years was recommended by the Chairman of the royal commission on the finances of Western Australia.

It was claimed by witnesses that three years was too short a term for any national Parliament, portion of that time being taken up in settling down after an election, and part of the time in preparation for a new election, and that during a further portion no business is done owing to the necessity of the Prime Minister attending an Imperial Conference. It was also urged that in the Commonwealth Parliament members for widely scattered constituencies have no opportunity of studying their electorates during a term of three years only.

Some of the witnesses assumed that if the term of the House of Representatives were extended, there would be a proportionate extension of the term for the Senate. Others thought that the term for the Senate should remain at six years, and should not be determined by doubling the period fixed for the House of Representatives or by endeavouring to make the time for holding the elections for both Houses coincide.

The term of the American and Mexican Houses of Representatives is two years; of the Swiss National Council and the Esthonian State Assembly, three years; of the French Chamber of Deputies, the German Reichstag, and the Austrian National Council, four years; of the British House of Commons, the Canadian House of Commons, and the South African House of Assembly, five years; and of the Irish Free State, six years.

The Senate.

The Senators for each State are elected by the people voting as one electorate. No use has been made of the provisional power of the Parliament of the State of Queensland under section 7 of the Constitution to make laws for dividing that State into divisions for the purpose of electing Senators, or of the power of the Commonwealth Parliament under that section to depart, if it sees fit, from the principle of "one State one Senatorial electorate." The times of elections of Senators for each State have been determined by the State Parliaments, and no difference has arisen between State and Commonwealth authorities, the practice being that the Governor-General informs the Governors of the States upon what day the elections for the House of Representatives will be held, and what will be the polling places, and the Governors of the States fix the times and polling places for the Senate elections accordingly. The franchise is the same as for the House of Representatives.

Under the *Commonwealth Electoral Act* 1902 the voter had to vote for the full number of candidates to be elected, by putting a cross opposite the name of each candidate for whom he voted, and the candidates to the number required to be elected who received the greatest number of votes were to be elected (ss. 150, 161). This system was continued until 1919, though preferential voting was introduced for elections to the House of Representatives in 1918 (cf. the *Commonwealth Electoral Act* 1918, ss. 123, 124, 135 (7)). The *Commonwealth Electoral Act* 1919 provided for preferential voting in elections to the Senate. The voter has to indicate his first and subsequent preferences in respect of the prescribed number of candidates, and may indicate further preferences. The prescribed number of candidates means twice the number of candidates to be elected, plus one, or if there are fewer candidates than that number, the total number of candidates. Under the *Commonwealth Electoral Act* 1922 (ss. 4, 11), the names of candidates of the same party may be grouped in the ballot-papers. The system of preferential voting is designed to ensure, as far as possible, that the party, or combination of parties, which secures the highest number of votes for one of its candidates at the election of Senators shall gain all the places vacant at that election. This system is said to have been adopted at the request of a number of Senators. It gives no room for the representation of minorities. A bill embodying the principle of proportional representation for elections to the Senate was at one time prepared, but proportional representation has not been introduced, and the preferential system referred to above is still in force under the *Commonwealth Electoral Act* 1918-1928 (ss. 123, 135).

At an election of Senators, casual as well as ordinary vacancies may be filled. Under the *Senate Elections Act* 1903, those of the elected candidates who obtained the lowest number of votes were to fill the casual vacancies. By the *Senate Elections Act* 1922, a distinction is drawn between a short casual vacancy—for a period terminating on the 30th June following the election, and a long casual vacancy—for a period terminating after that day. A senator-candidate who desires to be capable of being elected to fill a long casual vacancy may resign for this purpose and his resignation will be conditional upon his being elected to fill such a vacancy. A short casual vacancy is to be filled by the first candidate, not being a senator-candidate, who is elected under the system of preferential voting to fill a periodical vacancy, i.e., an ordinary vacancy, and a long casual vacancy is to be filled under that system after the periodical vacancies have been filled.

Casual vacancies are filled, prior to a general election, by the Parliament of that State among whose representatives the vacancy has occurred. In some instances a candidate has been elected of the same party as the Senator whose place is vacant, although he has not belonged to the same party as the majority of the members of the State Parliament, but this system has not been generally followed.

The term for which a Senator is elected in an ordinary case begins on the 1st July following his election, though after a dissolution it begins on the 1st July prior to his election. The election to fill vacant places must be held within one year before the places become vacant.

The constitutional alterations to section 13, by which these provisions were inserted in the Constitution, were intended to secure, as far as possible, that elections for the Senate and the House of Representatives might be held on the same day, except when the House of Representatives is dissolved more than one year from the expiration of its term of three years, and that the elections might be held in the autumn rather than in the spring or early summer, one object being to avoid the expense of holding a separate election for the Senate, and the other to meet the views which were expressed after the election in December, 1903, that March or thereabouts would be more convenient for the electors, especially in agricultural districts, than November or December, or even October. In the debate on the bill by which the proposed alterations were submitted to the people it was urged that the alterations could not ensure that the elections for the two Houses would be held on the same day, and that under the alterations there would be the risk of having members in the Senate who had been rejected at the elections and whose term of office was about to expire (P.D. 1906, p. 3745). In the result, both elections have been held on the same date though not always in the autumn. In 1928 they were held in November. On several occasions Senators have been entitled to sit and vote for some months after being defeated at the polls. For the same period Senators elected have not been able to take their seats, and it is possible that before they can do so, measures on which they expressed themselves at the elections may have been disposed of by Parliament.

Relations of the Senate with the House of Representatives.

The relations of the Senate with the House of Representatives depend mainly on sections 53-55 of the Constitution relating to finance, and on section 57 relating to deadlocks.

In 1914 an attempt was made under section 128 to induce the Governor-General to submit proposed amendments of the Constitution to a referendum, after resolutions had been passed by the Senate in the manner prescribed by the second paragraph of that section, although the Ministry holding a majority in the House of Representatives would not act on these resolutions. This attempt failed, the Governor-General being guided by the advice of his Ministers.

It has been said of sections 53 and 55 that they represent one of the vital compromises of the Constitution whereby an adjustment was made so as to permit of responsible government as understood in British communities, that is, the responsibility of the Ministers of the Crown to the representatives of the nation considered numerically, and at the same time to guard the Senate from financial coercion in its representation of the nation organized in States. Of the two sections, section 53 is for parliamentary guidance only, and section 55 supplies a test of the validity of Acts imposing taxation which may be applied by the Courts.

A list of the cases, in which the High Court has considered the question whether an Act of the Commonwealth Parliament infringes section 55, will be found in Appendix D.

The nature of the power of the Senate to make or request amendments has been discussed in resolutions of both Houses, firstly as to the right of the Senate to press its requests (*see Harrison Moore,* 2nd

edition, page 148), and, secondly, as to the right of the Senate to make amendments which would increase charges on the people. The first occasion on which this question arose was in 1903 in debates on the Sugar Bounty Bill, which provided for the payment of a bounty to all growers of sugar, in the production of which white labour only was employed, and appropriated and made payable out of the consolidated fund whatever sum was required for that purpose. The Senate made an amendment extending retrospectively the time over which the bounty was payable and thereby increasing the number of persons entitled to the bounty. In the House of Representatives, the Prime Minister moved to disagree with the amendment as inconsistent with section 53 of the Constitution, in that it increased a charge or burden on the people, and the House accepted the motion. In the Senate it was finally resolved not to insist on the amendment, and the proposal was re-submitted to the House in the form of a request which was conceded (*see Harrison Moore*, page 149).

A list of the more recent requests of the Senate is set out below, together with the replies of the House of Representatives:—

Votes and Proceedings Page on which Senate's Schedule appears.	Date.	Title of Bill and Nature of Request.	How disposed of.
202–203	20th December, 1911	*Customs Tariff* 1911.—Thirty-one requests for alterations in duties, altered wording of items, &c.	Some requests agreed to, one disagreed to, one made with modification. Request disagreed to not pressed by Senate, and modification agreed to
136	15th December, 1914	*Land Tax Bill* 1914.—Six requests for amendments in rates of tax	Requested amendments made
537	15th December, 1916	*Supply Bill* (No. 3) 1916–17.—Request for reduction of total amount of vote with consequential amendments in Schedule	Requested amendments not made. Senate pressed request; Bill laid aside; another Bill brought in, giving effect to requested reduction, and passed by both Houses.
145	26th September, 1917	*Income Tax Bill* 1917.—Two requested amendments which would have the effect of exempting certain persons from tax	Requested amendments made
344	6th November, 1918	*Entertainments Tax Bill* 1918.—Requested amendment to exempt certain children's payments from Entertainments Tax	Requested amendments made
429	20th December, 1918	*Income Tax Bill* 1918.—Requested amendment to reduce tax in certain cases	Requested amendment made
183	21st May, 1920 ..	*War Gratuity Bill* 1920 (No. 2). — Requested amendments to alter rate of gratuity in certain cases	Requested amendments made

A list of the more recent requests of the Senate is set out below, together with the replies of the House of Representatives—*continued.*

Votes and Proceedings Page on which Senate's Schedule appears.	Date.	Title of Bill and Nature of Request.	How disposed of.
713–732	13th October, 1921	*Customs Tariff Bill* 1921.—92 requested amendments for alterations in the tariff	Some requested amendments made, some made with modifications, and others not made. Certain requests pressed or modified by Senate. Bill returned by House of Representatives with question raised as to right of Senate to press requests, and with original requested amendments made, made with modifications, made as modified by Senate, and not made. President made statement *re* unusual terms of message, and Senate passed motion that action of House of Representatives in receiving and dealing with reiterated requests is in compliance with constitutional rights of Senate. Modifications made by House of Representatives agreed to, and remaining requests not further pressed by Senate.
855	9th December, 1921	*Appropriation Bill* 1921–22. Request to increase a salary vote and to reduce another salary vote	Requested amendments not made, but Senate's request for the increase given effect to in new Bill (Supplementary Appropriation). Remaining request pressed by Senate, but not made by House of Representatives. Conference of representatives of both Houses appointed to deal with matter in disagreement; in view of this, request not further pressed
771	11th November, 1921	*Excise Tariff Bill* 1921.—Request for alteration in an item	Requested amendment made
126	15th September, 1922	*Meat Export Bounties Bill.*—Requests for amendments to extend payment of bounty	Requested amendments made
202	11th October, 1922	*Superannuation Bill.*—Request for amendments to extend superannuation benefits. (This is a case where both requests and amendments were made in the same Bill)	Requested amendments made

A list of the more recent requests of the Senate is set out below, together with the replies of the House of Representatives—*continued.*

Votes and Proceedings Page on which Senate's Schedule appears.	Date.	Title of Bill and Nature of Request.	How disposed of.
391	9th September, 1924	*Wine Export Bounty Bill.*—Request for amendment to extend payment of bounty	Requested amendment made
199–201	25th June, 1926	*Customs Tariff Bill* 1926.—Nineteen requests for alterations of duties, alterations in wording of items, &c.	Some requested amendments made, others made with modifications, and one not made. Senate agreed to modifications and did not press requested amendment not made
242	23rd July, 1926	*Judiciary Bill* 1926.—Request to vary conditions of pensions of justices	Requested amendments made
520–521	23rd March, 1928	*Customs Tariff Bill* 1927.—Nine requests for alterations of duties, alterations in wording of items, &c.	Some requested amendments made, others made with consequential modifications. Senate agreed to consequential modifications

It has been said that the objects for which the Senate was established were two:—(1) to act as the States House, and (2) to act as a chamber of revision. It was urged in evidence that either the Senate should be abolished or its constitution radically amended. It has been further said (cf. *Harrison Moore,* pp. 613, 614) that the failure of the Senate to act as a States House gave the Premiers' Conference added importance at a time when the financial relations of the States and the Commonwealth were undetermined and were about to come before Parliament or the people for reconsideration.

It is probable that the term "States House" needs definition. It cannot be assumed that the Senators were intended to oppose all proposed increases of Commonwealth powers or even that they were intended to support all the financial claims of the States, whether or not they were thought to be in the interests of the people of Australia. But it may be said that the Senate has judged many such proposals and claims from a party standpoint, and that in doing so it has not fulfilled its function of a States House and a chamber of revision. This result has followed from two factors, which were not entirely foreseen by the founders of the Constitution—the deepening of party feeling consequent on the predominance of industrial issues even in Federal elections, and the rigidity of party organization which in almost every State has made it impracticable for a candidate to succeed unless he secured the endorsement of one party or another. It has thus happened that parties have been divided on the same lines in the Senate as in the House of Representatives, and that, as the House of Representatives has the power to make and unmake Ministers, the Senate has lost in authority. No doubt the Senate may block legislation when it has a majority opposed to the government of the day, but

such a majority must as a rule be composed for the most part of members serving the second portion of their term of six years, and in such a case the greater authority would attach to the House which represents the most recent expression of the popular will.

It may not be safe to assume, however, that party divisions will continue to follow their present lines. There were signs during the inquiry by this Commission that there might be a grouping of the States which depend mainly on primary production in defence of common interests. If such a grouping did take place, the Senate would gain a new importance, and the less populous States would there exercise an influence, by reason of their equal representation, which they could not exercise in the House of Representatives.

At present the Senate does give the less populous States representation at the Seat of Government and in Commonwealth Ministries greater than they could obtain on a population basis, and does to some extent counteract the effect of a concentration of people in the two great cities. Moreover, it does enable a State to exercise an influence on matters in which it is particularly interested. It has been suggested that the Senate would be better qualified to act as a chamber of revision if representation were given to minorities under a system of proportional representation. At present, although parties may be almost equally divided in the constituencies, one party may so far predominate in the Senate that there may be no opportunity for the presentation of different points of view. On the other hand, it is said that a State should speak with one voice, and that the Senate can act as a States House only if all the representatives of that State are chosen from one party.

Reform of the Senate.

Suggestions for amending the constitution of the Senate will be found in the evidence of Dr. Watson, page 226, Professor Shann, page 457, Sir James Barrett, page 693, Sir Edward Mitchell, page 756, Senator Ogden, page 921, and Mr. Melbourne, page 1536.

These proposed amendments may be divided into two classes—(*a*) those which aim at a change in the method of election or in the composition of the Senate; and (*b*) those which aim at the abolition of the Senate and the substitution of some other body more directly representative of State governments. In the first class were proposals for fixing the age of electors for the Senate at 30 or 35 years, and of fixing the age of persons eligible for election at 30 or 35 years. In support of these proposals the examples of other modern Constitutions, such as those of the South African Union or of the Irish Free State, were quoted. In the same class of proposals were those of Dr. Watson that in elections for the Senate rural districts should have more numerous representation than they would be entitled to on a population basis, and that the States should be divided for purposes of the Senate elections into a number of electoral districts. The proposal that elections for the Senate should be held on some system of proportional representation was put forward by Sir James Barrett with a view to making the Senate more truly representative of all parties in the State and not merely of the party which has a majority, however slight, at the time when elections are held.

In the second class were proposals put forward by, amongst other witnesses, Professor Shann and Mr. Melbourne. Professor Shann at page 466 expressed himself as follows:—

> "I think that the most hopeful direction in which to amend the Constitution of the Senate is in the way of making it representative, possibly, of the governments and parliaments of the States. That is to say it should be representative of bodies organized for the purpose of government rather than representative of a popular vote. If we followed in that direction we would have the encouraging precedent of the United States Senate during the period of its greatest prestige and activity, of the Bundesrath of the Imperial German Constitution, the Reichsrat of the present German Constitution, which is a constitution much admired by constitutional lawyers, and of the Senate of the French Republic, which is representative of the communes of France, that is to say, the little local governing units".

Mr. Melbourne developed the parallel with the present German Constitution in greater detail. He advocated the establishment, in place of the Senate, of a Council of States, which should consist of representatives of State governments with the power of initiating legislation, and of delaying legislation for a limited time, and he advocated the addition to the Constitution of provisions for holding a referendum at the instance of the Council of States on proposed laws other than those for the amendment of the Constitution.

The establishment of the Commonwealth Parliament in addition to the State Parliaments.

The establishment of an additional Parliament of 111 members must, necessarily, have absorbed the service of some men who would have found a public career in State politics. The continuance of six State Parliaments must, necessarily, have absorbed some men who would have become members of a single national Parliament, had the Parliaments of the States been abolished. This division of interest and of service has become more noteworthy and more important than it would otherwise have been, since industrial questions have come to be the main question dividing parties in both Commonwealth and State Parliaments.

It was also urged before the Commission that this division of interest had the effect of weakening the interest of the electors in politics and of diminishing the authority of parliamentary institutions.

Again it was said that the Commonwealth Parliament had become less qualified to exercise wide powers of government since it had ceased to sit in one of the large centres of population, and the importance of a Parliament being in close touch with public opinion was urged before the Commission.

It may also be suggested that the possibility of competition between State and Commonwealth Parliaments in offering gifts or concessions to the electors is a danger to the political life and to the economic stability of Australia.

These are all effects of the working of the Constitution which must be taken into account in deciding whether the powers of the Commonwealth should be increased, or whether a unified government should be substituted for a Federal system in Australia.

The Executive Power of the Commonwealth.

Section 61 of the Constitution marks out the field of the executive power. This power is exercisable by the Governor-General as the Sovereign's representative, and under section 2 of the Constitution the Governor-General is to have, subject to the Constitution, such powers and functions as the Sovereign may be pleased to assign to him.

The Governor-General is not a general agent of the King. He is a special agent with power to carry out the Constitution and the laws, and such powers and functions as the King may assign to him. The Executive has no power to enter into contracts, except such as are authorized by Parliament, and except, possibly, contracts rendered necessary in the routine administration of a government department, and it does not acquire that power merely because Parliament has appropriated money for the purpose of the contracts (*Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.*, 31 C.L.R. 421; *Commonwealth* v. *Colonial Ammunition Co. Ltd.* 34 C.L.R. 198). The Commonwealth Parliament is limited to the powers conferred on it under the Constitution, and therefore cannot authorize a contract except in the exercise of those powers. If the interpretation of section 81 of the Constitution, acted upon by successive Commonwealth Governments, is incorrect and that section is construed as a restrictive section, and not a section authorizing the Commonwealth Parliament to appropriate money for all purposes thought to be beneficial to the people of Australia, a number of contracts entered into by the Commonwealth may be of doubtful validity.

The division of powers indicated in sections 1, 61 and 71 of the Constitution, does not prevent Parliament passing legislation which shall come into force upon the decision or finding of a specified Minister or official, and which has been described as conditional legislation. Within the limits of the Constitution the Commonwealth Parliament is a body of plenary powers and has the same power of delegation as the Parliament of a State.

Legislation is therefore valid, which under the *Customs Act* 1901-1925 gives to the Governor-General the power of saying what articles shall be prohibited imports or exports, and which gives to the Minister for Customs the power of fixing the classification of goods.

Legislation is also valid which gives to a Minister the power of passing regulations, which do or may affect the rights of parties. This was assumed to be the law without argument, when the regulations under the War Precautions Act fixing the price of bread were attacked in 1916, and was declared to be settled law in 1921, when the regulations which determined rights under the Treaty of Peace with Germany were attacked on the ground that they involved the exercise of legislative power by the Executive (*Farey* v. *Burvett*, 21 C.L.R., 433; *Roche* v. *Kronheimer*, 29 C.L.R., 329).

Responsible Government.

During the Convention Debates of 1891 it was predicted that, if responsible government were made part of the Constitution of the Commonwealth, either responsible government would be destroyed, or the Commonwealth would cease to be a federation. Both terms may need further definition than they received in 1891, or have received since.

Responsible government has existed, inasmuch as Ministers have been members of Parliament, the existence of Ministries has been sustained by a majority in Parliament, and the Governor-General has acted on the advice of his Ministers.

The constitutional position of the Governor-General may be illustrated by the grant of a double dissolution on the request of Mr. Cook in June, 1914, and by the summoning of Mr. Hughes to be again Prime Minister after his resignation in 1917. The Governor-General retains the right to refuse a dissolution to a Prime Minister after defeat in the House of Representatives, and has exercised that right on the 17th August, 1904 (Mr. J. C. Watson), on the 5th July, 1905 (Mr. G. H. Reid), and on the 27th July, 1909 (Mr. Andrew Fisher).

In the one case in which recourse was had to the alternative procedure in section 128 under which the Governor-General may submit a proposed law to the electors after it has been passed by one House and two attempts have been made to obtain the concurrence of the other House, the Senate sought to have the bills which had been rejected at the referendums of 1911 and 1913 again submitted to the electors. The Governor-General, acting on the advice of his Ministers, declined to submit them (Parliamentary Debates, 1914, Vol. lxxiv, p. 2420). Apparently the Governor-General regarded himself as bound to accept the advice of his Ministers. One view is that the alternative procedure is intended to give a majority of the States an opportunity, through their equal representation in the Senate, of getting proposals for the alteration of the Constitution before the people, notwithstanding that the proposals may not be approved by a Commonwealth Ministry. The other view is that the responsibility of Ministers for Commonwealth expenditure makes it proper that the Governor-General should not commit the Commonwealth to the expenses of a referendum except on the advice of Ministers. If, as seems probable, the precedent set in 1914 is followed in future cases, it may be regarded as an instance of responsible government prevailing over a federal principle in a Constitution which seeks to combine them.

The prediction that responsible government would destroy federation rests on the theory that a system of government is not a federation unless the House, in which the States are represented as States, enjoys equal power with the House for which the members are elected on a population basis. Since measures imposing taxation must originate in the House of Representatives, and since no Ministry may remain in office unless it has a majority in that House, it is clear that the Senate and the House of Representatives do not enjoy equal authority. But it does not appear that for that reason Australia has ceased to be a federation, since the States cannot be deprived of the powers left to them by the Constitution except by an amendment of the Constitution approved by a majority of the electors and a majority of the States.

The Commonwealth Bank.

The *Commonwealth Bank Act* 1911 was assented to on the 22nd December, 1911, and came into force on the 15th July, 1912, by virtue of a proclamation published in the *Gazette* on the 13th July, 1912. The *Australian Notes Act* 1910 came into force on the 1st November, 1910, and was subsequently amended by the *Australian Notes Act* 1911, which came into force on the 1st July, 1912. The *Bank Notes Tax Act* 1910 was assented to on the 10th October, 1910, and came into force on the 1st July, 1912.

By the last of these three Acts it was provided that a tax at the rate of 10 per cent. per annum should be levied on all bank notes issued or re-issued by any bank within the Commonwealth and not redeemed. The effect of this Act was to prevent any bank, other than the Commonwealth Bank, from issuing notes, although not strictly prohibited from doing so.

The *Australian Notes Act* 1910-1911 provided for the issue of Australian Notes and Treasury Bills, the appropriation of moneys derived from the issue of Australian Notes to a trust account, and the application of the proceeds of the sale of Treasury Bills in the redemption of Australian Notes.

The effect of this Act was to enable bank notes to be issued by the Australian Notes Board, until the functions of that Board were transferred to the Commonwealth Bank.

The *Commonwealth Bank Act* 1911 is divided into seven parts. Part II. provides for the establishment of a Commonwealth Bank, to be called the Commonwealth Bank of Australia. This Bank is to have the power to carry on the general business of banking, but not the power to issue bank notes. It is to have a capital of one million pounds to be raised by the sale of debentures, and the Treasurer of the Commonwealth may make advances to the Bank for administrative purposes, the funds for these advances being appropriated by the Act. Part III. provides for the management of the Bank by a Governor and Deputy Governor and for the appointment of bank officers. Part IV. consists of general provisions and provides for the disposal of the net profits of the Bank, one half to a reserve fund and one half for the repayment of advances and the redemption of the debentures or stock, but so that where the amount available for redemption exceeds the amount of debentures or stock in circulation, the excess may be used for the redemption of Commonwealth debts or State debts taken over by the Commonwealth. Part IV. also provides that the Commonwealth shall be responsible for the payment of all moneys due by the Bank. Part V. provides for the establishment of a Savings Bank Department of the Commonwealth Bank, and for the employment, by arrangement, of Commonwealth officers as agents of the Bank. Part VI. provides for the issue of debentures, and Part VII. for the punishment of miscellaneous offences, and for the making of regulations.

The *Commonwealth Bank Act* 1911 was amended in 1914, 1920, 1924, 1925, and 1927.

The principal object of the amending Act of 1914 was to enable arrangements to be made whereby the Savings Bank Department might take over the Savings Banks of the several States on such terms and conditions as might be thought fit.

The amending Act of 1920 dealt with the issue of Australian Notes by the Commonwealth Bank. It repealed the *Australian Notes Act* 1910-1914, and provided for the establishment of a Note Issue Department of the Commonwealth Bank, the appointment of a Board of Directors for that Department, the transfer of the assets and liabilities of the Treasurer under the *Australian Notes Act* 1910-1914, and the issue of Australian Notes. The amending Act provides for the maintenance of a gold reserve of not less than one-fourth of the amount of the Australian Note Issue, and for the furnishing of weekly returns

by the joint stock banks of the value of the notes held by those banks, and it empowers the Governor-General in an emergency to authorize the transfer of the control of the Australian Note Issue from the Bank to the Treasurer for such period as is specified by proclamation.

The amending Act of 1924, which came into force on the 10th October, 1924, provides for the appointment of a Board of Directors in addition to the Governor and Deputy Governor, and that the capital of the Bank shall be twenty million pounds. It also provides for the settlement of balances between such banks as are specified by proclamation to be conducted through the Commonwealth Bank, and for the supply of banking statistics by the joint stock banks to the Treasurer.

The amending Act of 1925 provides for the establishment of a Rural Credits Department of the Bank, for loans to this department by the Treasurer up to a total of three million pounds, for the payment to this department of 25 per cent. of the net annual profits of the Note Issue Department, and for the issue of debentures by the Bank for the purposes of rural credits. The amending Act further provides for the making of advances by this department, upon the security of primary produce placed under the legal control of the Bank, to the Bank or other banks, to co-operative associations and to such other corporations or incorporate bodies as are specified by proclamation. It directs that the funds of the Bank shall not be used in the business of the Rural Credits Department, except so far as advances may be made to that department, and that of the net profits of the Rural Credits Department one-half shall be placed to the credit of the Rural Credits Development Fund to be used, in such manner as the Board directs, for the promotion of primary production.

By the amending Act of 1927, which came into force on the 9th June, 1928, the provisions of the Acts of 1911 and 1914 relating to the Savings Bank Department of the Commonwealth Bank are amended. A Commonwealth Savings Bank of Australia is established, to be managed by a Commission consisting of a Chief Commissioner and two other Commissioners, and pending the appointment of this Commission by the Board of Directors of the Bank. The amending Act also provides that the Commonwealth Savings Bank shall have the same power to make arrangements with State Savings Banks as was formerly exercisable by the Commonwealth Bank, and that arrangements made by the Commonwealth Bank with the States of Queensland and Tasmania shall be binding on the Commonwealth Savings Bank. The Commonwealth Savings Bank is empowered to invest any moneys held by it, *inter alia*, in advancing money in accordance with the *Commonwealth Housing Act* 1927 for the purchase or erection of dwelling houses and for the discharge of mortgages on dwelling houses, and in advancing money for the erection of warehouses or storage facilities intended for the warehousing or storage of primary products.

The *Commonwealth Housing Act* 1927 (since amended by Act No. 10 of 1928) provides for the creation of a Housing Fund. This fund is to consist partly of money set aside by the Commissioners of the Bank for the purpose, the discretion of the Commissioners being strictly limited by the Act, and partly of money borrowed by the Treasurer in such a manner that the Housing Fund shall at no time exceed twenty million pounds. Loans from the Housing Fund are to be made only

to approved authorities. These approved authorities must have power to make advances for dwelling houses up to 90 per cent. of the valuation of the security, but not beyond a maximum amount of £1,800 to any one person. It is also required that the system administered by the authority shall not entitle one person to more than one loan, and that the loan is to enable him to build a house in which he will reside or to redeem a mortgage over a house in which he does reside.

It was said in evidence that the establishment of a Savings Bank Department of the Commonwealth Bank was objectionable on two grounds—(1) because it imposed unnecessary expense on the community, there being already Savings Banks in existence in each State; and (2) because it reduced the amount available for development in each State. Further, it was claimed that the States have been unduly handicapped in competition by the Commonwealth taking over the Post Office Savings Banks, the Post Offices having formerly acted as agents for the State Savings Banks. This competition exists in all the States, except Queensland and Tasmania. The rate of interest paid by the Commonwealth Savings Bank is the same as that paid by the State Savings Banks, although until recently the rate paid by the Commonwealth Savings Bank in New South Wales, Victoria and South Australia was slightly lower than that paid by the State Savings Banks.

In the States of Queensland and Tasmania 70 per cent. of all new money is made available to the State Government at a rate 1 per cent. above the rate of interest paid on deposits, and the assets taken over from the Queensland State Savings Bank include a number of long-dated government bonds. Offers of arrangements with the other States for taking over State Savings Banks have been made and considered, but without success. It was said in evidence by the Governor of the Commonwealth Bank that if the State Savings Banks were taken over, the facilities offered to investors in the country districts would be no less than they are at present, and it appears from the evidence of Mr. C. F. Hudson (p. 1210) that in New South Wales there has been a steady progress, notwithstanding the competition of the Commonwealth Savings Bank. It is the policy of the Board of Directors, even in those States in which both Commonwealth and State Savings Banks exist, to invest within each State as far as possible the moneys deposited in that State.

The Commonwealth Housing Act was criticized as an intrusion on the functions of the States, and as an instance of that form of competition which forces one or other government to go beyond the limits of what is economically defensible. The Act had not been proclaimed when evidence on the subject was given, but it was explained that the Commonwealth Savings Bank would make advances to those State authorities whose powers were within the limits described by the Act, and that those authorities would make advances to individual builders or owners. In New South Wales the housing authority is the Government Savings Bank; in South Australia, it is the State Bank; in Western Australia, it is the Workers' Homes Board, and in the Federal Territory, the Federal Capital Commission.

With regard to Commonwealth loans, the Bank acts as agent, keeps the Inscribed Stock Ledger, and accepts applications. In Australia the Bank does the whole of the work connected with the raising of a loan

for the Commonwealth, and it floated most of the War Loans. In London it also acts as agent, obtains advice, and consults the underwriters and the High Commissioner.

The Commonwealth Bank does the banking business of the Governments of South Australia, Queensland, and Tasmania, both in Australia and England; it does the banking business of the Government of Western Australia, in Australia, and some of the business of the State of Victoria. It has done a very large business in financing municipal institutions, after a careful scrutiny of the objects of a proposed loan and of the security offered; and through its Rural Credits Department it has made advances to co-operative societies and pools. The total of these advances is about £2,000,000, and there have been no losses. The Commonwealth Bank has 87 branches. Its profits are distributed as to 50 per cent. to the reserve fund of the Bank, and as to 50 per cent. to the Treasurer for payment to the sinking fund for the redemption of Commonwealth loans. Cheques drawn on the Bank are not exempt from stamp duty imposed by the laws of a State, but the Bank is not liable to make returns required of ordinary joint stock banks by the State of Queensland.

The Inter-State Commission.

The powers and functions of the Inter-State Commission are defined in sections 101, 102, and 104 of the Constitution; they include such powers of adjudication and administration as the Parliament deems necessary for the maintenance within the Commonwealth of the provisions of the Constitution relating to trade and commerce, and of all laws made thereunder, and certain powers relating to rates on State railways which may be found to involve a preference or discrimination against any State. The provisions of the Constitution relating to the appointment of the Inter-State Commission are mandatory, but those provisions relating to trade and commerce are not exclusive. The Inter-State Commission was not intended to supersede executive action or judicial control, or to have a branch of the civil service to execute its decrees.

Before the Inter-State Commission was appointed it was proposed at the Premiers' Conference of 1909 that the Commission should have power to prevent unfair competition between States caused by differences in State industrial legislation or the awards of State Industrial Courts. A provision giving effect to this proposal was included in a bill for the establishment of an Inter-State Commission introduced into the Senate in 1909, but afterwards abandoned. The *Inter-State Commission Act* 1912 was assented to on the 24th December, 1912, and is still in force. The Act is divided into five parts. The first part consists of definitions; the second part provides that the Commission shall consist of three members of whom one shall be of experience in law, that the Chief Commissioner shall receive a salary of £2,500, and the other Commissioners a salary of £2,000 each, and that two Commissioners shall be a quorum for the transaction of business and have all the powers of the Commission.

Part III. of the Act relates to investigations by the Inter-State Commission, and is divided into two sections—ss. 16 and 17. By section 16 the Commission is charged with the duty of investigating all matters which in its opinion require investigation in the public interests affecting

(*a*) the production of and trade in commodities; (*b*) the encouragement, improvement, and extension of Australian industries and manufactures; (*c*) markets outside Australia, and the opening up of external trade generally; (*d*) the effect and operation of any Tariff Act or other legislation of the Commonwealth in regard to revenue, Australian manufactures, and industry and trade generally; (*e*) prices of commodities; (*f*) profits of trade and manufacture; (*g*) wages and social and industrial conditions; (*h*) labour, employment, and unemployment; (*i*) bounties paid by foreign countries to encourage shipping or export trade; (*j*) population; (*k*) immigration; and (*l*) other matters referred to the Commission by either House of the Parliament, by resolution, for investigation. By section 17, the Commission is empowered to investigate a number of questions relating to rivers.

Part IV. of the Act prescribes that all rates fixed by any common carrier for any service rendered in respect of inter-state commerce, or which affect inter-state commerce, shall be reasonable and just, and gives the Commission power to deal with rates fixed by State railway authorities or other State authorities within the limits prescribed by sections 102 and 104 of the Constitution.

Part V. purports to confer on the Commission judicial powers, and to give the Commission jurisdiction to adjudicate upon (1) preferences by a State or common carrier; (2) the justice or reasonableness of any rate in respect of inter-state commerce; (3) anything done or omitted by any State or by any State authority or by any common carrier or by any person in contravention of the Act or of the provisions of the Constitution relating to trade or commerce. The Commission is also empowered to fix rates for the future, to amend regulations, to impose penalties, and itself to initiate proceedings.

The portion of the Act which purported to confer judicial powers on the Inter-State Commission was declared invalid in 1915, by the High Court, on an appeal from a decision of the Inter-State Commission, which by a majority had issued an injunction restraining the State of New South Wales from enforcing the *Wheat Acquisition Act* 1914, on the ground that that Act was an infringement of section 92 of the Constitution (*State of New South Wales* v. *Commonwealth,* 20 C.L.R., at pp. 64-65.) In that case Sir Samuel Griffith, *C.J.*, said:—

> "The functions of the Inter-State Commission contemplated by the Constitution are executive or administrative, and the powers of adjudication intended are such powers of determining questions of fact as may be necessary for the performance of its executive or administrative functions, that is, such powers of adjudication as are incidental and ancillary to those functions. For instance, if a Federal law imposed obligations as to structures or appliances to be used in connexion with inter-State railway traffic, and entrusted the duty of carrying out those provisions to the Inter-State Commission, it might empower the Commission to determine the question whether in any particular case the provisions of the law had been observed in point of fact, and, if they had not, to demolish the structures or forbid the use of appliances contravening the law, and for that purpose to use any necessary force, or to invoke the aid of a Court of law to ensure obedience to its order."

At the time of and prior to this decision, the Commission had one other application before it, and was about to institute proceedings relating to inter-state rates, and it had conducted inquiries into tariff proposals

with a view to framing a tariff which should be consistent in all its parts. The Commission continued to conduct inquiries, including inquiries into the prices of commodities and an inquiry into the trade relations of Australia with the Islands of the Pacific, conducted by the Chief Commissioner. A bill was introduced in 1919, after much preliminary discussion, for the creation of a Court of Commerce through the Inter-State Commission, but was abandoned after its first reading.

One of the Commissioners resigned in 1918, and no appointment was made in his place. The Commission ceased to exist in fact when the two remaining Commissioners came to the end of their respective terms of office.

A full statement of the views of the Commissioners on the scope and value of the Inter-State Commission will be found in a letter from the Chief Commissioner to the Hon. W. A. Watt, the Acting Prime Minister, dated the 26th July, 1918, and printed at p. 177 of the evidence.

Portion of the work assigned to the Inter-State Commission, is now carried out by Boards or Commissions appointed for definite and limited purposes, e.g., the Tariff Board and the Development and Migration Commission. Some of the grievances caused by differential railway rates have been removed by an agreement between the Railway Commissioners of the several States, and by the extension of the Victorian railway system into the south-western Riverina, although there appears to be still ground for the belief that goods are attracted away from their natural ports, both by classification for freight purposes, and by the building of railway lines to a point short of the State boundary.

Witnesses before this Commission claimed that the Inter-State Commission could do very valuable work in directions other than those indicated in the Act of 1912. Suggestions were made that the Inter-State Commission should inquire into all proposals for making grants to States, and into laws which place some States at a disadvantage as compared with others, although they do not infringe the provisions of the Constitution, and generally should keep Parliament informed as to the effect of Commonwealth laws and institutions. It was said that if these suggestions were adopted, justice would be done to the States, and danger of competition for the votes of the States would be removed from the political life of the Commonwealth. It was further suggested that there would be ample work for such a body, in conducting inquiries which are now carried out by bodies appointed for a single inquiry.

Alternative suggestions for the appointment of expert economists, either as officers of the Bureau of Census and Statistics, or as direct advisers to the Government, were also made by witnesses before this Commission.

The re-instatement of the Inter-State Commission was strongly recommended by the royal commission which inquired into the finances of Western Australia. The royal commission appointed to inquire into the finances of South Australia also recommended the establishment of the Inter-State Commission or of an independent body, appointed for a limited period, for the purpose of considering and advising on applications for grants by States.

VI.—THE GOVERNMENT OF THE STATES.

Internal administration.

The States at the establishment of the Commonwealth were already organized for all the purposes of self-government within the British Empire. Since the establishment of the Commonwealth, the State of South Australia has surrendered the Northern Territory to the Commonwealth, and the State of New South Wales has surrendered the Federal Capital Territory and an area of land at Jervis Bay to the Commonwealth. With these exceptions the boundaries of the States remain unaltered, but the State of New South Wales has by agreement with the State of Victoria allowed that State to build and administer railways within portion of its territory, and the Commonwealth, by the *Northern Australia Act* 1926, has provided machinery by which portions of Western Australia or Queensland, with the consent of those States, may be administered as portions of North Australia.

Each State after the establishment of the Commonwealth retained its own Constitution, including the power of amendment, subject to the Federal Constitution. The manner in which the power of amendment may be exercised varies in the several States. This power has been exercised in all the States since the establishment of the Commonwealth, the most noteworthy instance being the abolition of its Legislative Council by the State of Queensland.

Certain bills passed by a State Parliament must be reserved for the royal assent under the *Australian States Constitution Act*, 1907, an Imperial Act which provides that the following bills shall be reserved for the signification of His Majesty's pleasure thereon, namely, any bill which alters the Constitution of the Legislature of a State, or affects the salary of the Governor of a State, or is, under any Act of the Legislature of the State passed after the passing of the *Australian States Constitution Act*, 1907, or under any provision contained in the bill itself, required to be reserved. Apart from this Act, and apart from any instructions given to the Governor of a State by His Majesty, the power of amendment of the State Constitutions is unfettered.

It was suggested in evidence before the Commission that the Commonwealth should have the right of vetoing alterations in the Constitution of a State, or that State Constitutions should be provided for in the Commonwealth Constitution, or that no amendment should be valid unless confirmed by a vote of the electors on a referendum.

Each State has its own Governor, who is appointed by the Imperial Government. The Crown is one and indivisible in the Commonwealth, but acts through Commonwealth and State agencies. A State may be subject to a law of the Commonwealth, although the Crown is not mentioned in the Commonwealth Act. A State may be sued in a Commonwealth Court without its consent, and it has been said that for that reason the States are no longer properly described as sovereign States (*The Commonwealth* v. *New South Wales*, 32 C.L.R. 200).

The position of the States relatively to that of the Commonwealth has been adversely affected by a number of decisions of the High Court. Among the most important of these decisions are—

(1) *The King* v. *Sutton* (5 C.L.R. 789) and *Attorney-General for New South Wales* v. *Collector of Customs* (5 C.L.R. 878), in which it was held that the Commonwealth had power to levy duties of customs on the importation of goods by a State.

(2) *State of New South Wales* v. *The Commonwealth* (7 C.L.R. 179), in which it was held that the Commonwealth was entitled to appropriate the surplus of revenue unexpended in any one year, without being bound to distribute any portion of that surplus among the States.

(3) *The Engineers' Case* (28 C.L.R. 129), in which it was held that an award of a Commonwealth Court would apply to employees in State industries, and in which the High Court discarded the doctrine of mutual non-interference between the Commonwealth and the States, holding that the powers of the Commonwealth Parliament are to be ascertained in accordance with the rules of construction applicable to statutes, and that no prohibition against the exercise of those powers can be implied from the federal nature of the Constitution, nor can a possible abuse of those powers narrow their limits.

(4) *McArthur* v. *State of Queensland* (28 C.L.R. 530), in which it was held that a State could not fix the price at which goods subject to an inter-state contract might be sold within that State.

(5) *Clyde Engineering Co.* v. *Cowburn* (37 C.L.R. 466), in which it was held that an award of the Commonwealth Court of Conciliation and Arbitration was a law of the Commonwealth, and would over-ride a law of a State inconsistent with the award.

The States retained the control of civil and criminal justice, which was described in the *Federalist* as the most powerful, most universal, and most attractive source of popular obedience and attachment. They are thus responsible for the enforcement of Commonwealth as well as of State laws, with a few minor exceptions, and the Commonwealth Government depends on the police forces of the States for the enforcement of its laws relating to Commonwealth instrumentalities, to the enforcement of industrial awards and to trade and commerce with other countries. The State Parliaments are the only Parliaments that have power to pass laws relating to industrial conditions, except in relation to trade and commerce with other countries and among the States and to navigation and shipping, and they have the control of education, health, land settlement, development, and internal communications.

Since industrial questions have entered largely into the politics of Australia, State politics excite the keenest party feeling and popular interest, and the industrial economic and financial position of Australia depends very largely on the decisions of State Parliaments. The financial relations of the States and the Commonwealth are discussed elsewhere in this report.

Relations of the States.

On the establishment of the High Court any differences between the States which were capable of decision on legal principles became cognizable by the High Court (*cf. South Australia* v. *Victoria*, 18 C.L.R. 115), and no appeal lies from a decision of the High Court to the Privy Council on a question relating to the limits of the constitutional powers of any two or more States *inter se*, without a certificate of the High Court.

The States in their external relations.

In the 1891 draft of the Federal Constitution it was provided that the Governor-General should be the sole channel of communication between the Governors of the States, and the Imperial Government. This provision did not appear in subsequent drafts, and does not appear in the Constitution. Governors of the States now communicate in all State matters with the Imperial Government, through the Secretary of State for the Dominions, and the royal assent to reserved bills is communicated by the Secretary of State to State Governors. Two of the States, South Australia and New South Wales, claimed the right to attend the Imperial Conference of 1907. Their claim was contested by the Prime Minister of the Commonwealth and was denied by the Secretary of State for the Colonies, mainly on the ground that the Commonwealth was not the agent of the States, and that the subjects to be considered at the conference were mainly of Commonwealth concern. The States have subsequently been consulted by the Imperial Government on subjects in which they are directly interested, and they retain the right of independent recommendation for honours.

The British Government, however, has consulted the Commonwealth, whenever it has been asked by a State to obtain redress of the grievances of one of the citizens of the State from a foreign country, and the Commonwealth has nominated the representatives from Australia at conferences held under the auspices of the League of Nations.

The States still exercise the right of separate representation in London, through Agents-General, and there has always been co-operation between the Agents-General for the States and the High Commissioner for the Commonwealth. Although the Commonwealth Loan Council has become the borrowing authority on behalf of the States and the Commonwealth, and the Commonwealth has begun to assist in or to control the marketing of primary products, a number of witnesses before the Commission expressed the view that it would be to the advantage of the States to continue their separate representation in London.

VII.—THE ACQUISITION AND GOVERNMENT OF THE TERRITORIES.

The Territories of the Commonwealth are the following:—Papua, the Northern Territory, Norfolk Island, New Guinea, and the Federal Capital Territory. The Commonwealth Parliament has power to make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth or of any territory placed by the Sovereign under the authority of and accepted by the Commonwealth or otherwise acquired by the Commonwealth. Of the Territories mentioned above, the Northern Territory and the Federal Capital Territory were surrendered by States; Papua and Norfolk Island were placed by the Sovereign under the authority of and accepted by the Commonwealth; New Guinea was otherwise acquired. Nauru is a territory administered by an administrator appointed by the Australian Government by agreement with the governments of the United Kingdom and New Zealand. The power of the Commonwealth Parliament to legislate for any of these territories is that of a quasi-sovereign State and is not fettered by any of the limitations or restrictions imposed on the Parliaments of the State and the Commonwealth by the Constitution. The Commonwealth Parliament may, therefore, legislate for the territories with respect to education and land settlement, it may declare that any Act of the Commonwealth or a State is to be binding on any territory, or it may confer on the Governor-General in Council or any local officer the power of legislating by means of ordinances or regulations. The Parliament may also, notwithstanding the provisions of section 71 of the Constitution, authorize an appeal to the High Court from a judgment given by a Court of a territory, which is not a Federal Court within the meaning of that section, and this power has been exercised in relation to the Mandated Territory of New Guinea, as well as in relation to the Northern Territory, Papua, and Norfolk Island (*cf. Porter* v. *The King*, 27 C.L.R. 432). Notwithstanding the provisions of section 80 of the Constitution a person accused in a territory of an offence triable [illegible] indictment is not necessarily entitled to a jury (*R.* v. *Bernasconi*, [illegible] C.L.R. 629). The provisions of section 92 do not apply to trade between a Territory and a State, but similar provisions have been incorporated in the *Northern Australia Act* 1926, and may apply against the Territory.

It has been said, however, that the Commonwealth Parliament has no power to provide for the surrender of any area of a territory once acquired by the Commonwealth, nor the State any power to accept it, except after referendum. The Commonwealth, if this is so, cannot surrender to the State of New South Wales a portion of the Federal Territory which the Federal Capital Commission has no desire to acquire and which could be conveniently administered as part of the Municipality of Queanbeyan. It is possible that the same difficulty may occur in connexion with the Northern Territory.

By the *State and Territorial Laws and Records Recognition Act* 1928 the same recognition is to be given to the laws of the Territories as to the laws of the Commonwealth and the States.

Papua.

Prior to the 6th March, 1902, British New Guinea was a Crown Colony under an Administrator, subject to the control of the Governor of Queensland acting on the advice of his Ministers. In support of the administration a subsidy was paid by the three Colonies, Queensland, New South Wales and Victoria. By Order in Council of the 6th March, 1902, followed by Letters Patent of the same month, the possession was placed under the authority of the Commonwealth. These Letters Patent were to cease to have effect as soon as the Commonwealth Parliament made laws for the Government of the possession, and the Governor-General signified by proclamation that this had been done. Pending the issue of this proclamation the Governor-General was to be at liberty to exercise the powers formerly exercised by the Governor of Queensland.

The *Papua Act* 1905, passed by the Commonwealth Parliament to provide for the administration of the Territory, was assented to on the 16th November, 1905, and came into force on the 1st September, 1906. The Territory is governed by a Lieutenant-Governor with an Executive Council and a Legislative Council which includes five non-official representatives nominated by the Lieutenant-Governor, of whom one is nominated as representing Christian Missions. A subsidy, which is now £50,000 per annum, is paid by the Commonwealth Government. Ordinances may be made by the Legislative Council subject to the provisions of the *Papua Act* 1905-1924, for the peace, order and good government of the Territory, but certain ordinances must be reserved for the signification of the Governor-General's pleasure thereon. These ordinances are enumerated in section 41 of the *Papua Act* 1905-1924, and include ordinances relating to the sale or disposition of lands by aboriginal natives, to native labour, or to the introduction or immigration of aboriginal natives of Australia, Asia, Africa, or any Island of the Pacific. The Lieutenant-Governor must report at monthly intervals to the Minister. Among the ordinances to which assent has been given is one providing for the exclusion of coloured labour from overseas.

The Navigation Act, which was originally passed by the Commonwealth Parliament in 1912, but was not proclaimed until after the war, was extended to Papua and the Mandated Territory of New Guinea in 1921. Accordingly until after the amending Act, which was passed in 1925, no vessels, except those which complied with the conditions applicable to the Australian coasting trade, could carry passengers or cargo between any port of Papua or the Mandated Territory and any other Australian port. Under the amending Act, No. 8 of 1925, the operation of the coastal provisions of the Navigation Act was suspended by proclamation from the 1st September, 1925.

By the *Customs Tariff* (*Papua and New Guinea Preference*) 1926, assented to on the 15th February, 1926, certain goods imported into Australia direct from New Guinea or Papua, if produced within either of these Territories, are to be free of duty. These goods are specified in a schedule to the Act, and are coffee, dried fruits, fresh fruits, fungi, ginger, Rangoon beans, coco-nuts, and seeds.

The Northern Territory.

The Northern Territory is referred to in covering clause 6 as being with South Australia an original part of the Commonwealth. The Northern Territory had been annexed to South Australia from New

South Wales by Letters Patent of the 6th July, 1863, which contained an express power of revocation and amendment. An agreement for the surrender to and acceptance by the Commonwealth of the Territory was made on the 7th November, 1907, subject to the approval of the Parliament of the Commonwealth and of the State of South Australia. The Commonwealth Parliament gave its approval by the *Northern Territory Acceptance Act* 1910, the Parliament of South Australia by the *Northern Territory Surrender Act* 1907, which was assented to on the 14th May, 1908. The Territory was transferred to the Commonwealth by proclamation issued on the 1st January, 1911.

By the agreement the Commonwealth undertook (*a*) to become responsible for the debt of the State of South Australia in respect of the Territory; (*b*) to construct the transcontinental railway running north and south; (*c*) to pay the price of the existing Port Augusta Railway. The State of South Australia undertook to allow the Commonwealth to construct a railway running westerly through South Australia to Western Australia.

Under the *Northern Territory Acceptance Act* 1910 (s. 7), all laws in force in the Northern Territory at the time of the acceptance are to continue in force, but may be altered or repealed by or under any law of the Commonwealth. These laws are the laws of the State of South Australia, and they have remained in force except so far as altered under the provisions of the *Northern Territory (Administration) Act* 1910 (*cf. Buchanan* v. *The Commonwealth*, 16 C.L.R. 315; *McKinnon* v. *The King*, 40 C.L.R. 217.) That Act provides for the appointment of an Administrator and of other necessary officers, and for the application of certain Acts of the Commonwealth Parliament to the Territory. It also empowered the Governor-General to make ordinances having the force of law in the Territory, to be laid before both Houses of the Parliament and to be subject to disallowance by a resolution of either House as provided in the Act. The Act was to commence on the day fixed by proclamation for the commencement of the *Northern Territory Acceptance Act* 1910.

Under the *Northern Territory Representation Act* 1922 the Northern Territory has one representative in the Parliament of the Commonwealth, who is to sit in the House of Representatives, to be qualified to take part in all debates but not to vote on any question, and not to be qualified to act as Speaker or Chairman of Committees.

By the *Northern Australia Act* 1926, which came into force on the 1st February, 1927, certain sections of the above-mentioned Acts were repealed and important changes were made in the administration of the Territory. The preamble to this Act recites that it is expedient that, in anticipation of and with a view to the making of provision for the establishment of a measure of self-government in the Northern Territory, further provision be made for the development and government of the Territory. The Act is divided into five parts.

In the first, Central Australia is defined as that part of the Territory situated south of the twentieth parallel of south latitude, and North Australia as that part of the Territory situated north of the twentieth parallel of south latitude.

Part II. provides for the establishment of a North Australia Commission of three Commissioners, appointed for five years each, with a limited discretion as to making official appointments. One of the duties

of the Commission is to prepare a scheme for the development of the Territory as soon as practicable after its appointment. No expenditure is to be incurred by the Commission except as authorized by the Minister. No railway is to be authorized by Parliament except in pursuance of an Act of the Parliament, and no public work the estimated cost of which exceeds £25,000, is to be authorized by Parliament except in pursuance of an Act the bill for which has been introduced into the Commonwealth Parliament by or on behalf of the Minister.

The third part gives power to the Commonwealth to make an agreement with any State which adjoins the Northern Territory for the application to a part of that State contiguous to the Northern Territory of all or any of the measures of development contemplated by the Act, and for the representation of the contiguous State on the Commission.

Part IV. is divided into four divisions. The first division prescribes the method of dividing the Northern Territory into North Australia and Central Australia, and provides for the transfer of officers and for the continuance, after division, of the existing courts pending further arrangements. The second division empowers the Governor-General to appoint a Government Resident for North Australia, and provides for the establishment of an Advisory Council consisting of the Resident and four members, two appointed by the Minister for three years and two elected by residents in North Australia having the same qualifications and disqualifications as electors for the House of Representatives. Division 3 makes a similar provision for Central Australia. Division 4 provides for the application of certain Acts of the Commonwealth Parliament to North and Central Australia, and empowers the Governor-General to make ordinances for the government of North and Central Australia. An ordinance is to have the force of law, but is to be laid before both Houses of Parliament and is to cease to have effect if either House passes a resolution disallowing the ordinance of which notice has been given within fifteen sitting days of its being laid before the House.

In pursuance of this Act Commissioners have been appointed and have made the prescribed reports, but no arrangements have been made with a contiguous State as provided in Part III. of the Act.

Division 4 of Part IV. also provides that trade, commerce and intercourse between North Australia, Central Australia and the States, shall be absolutely free, that the revenues of North Australia and Central Australia, other than the revenue of the Commission, which shall consist of charges for services, and moneys appropriated or borrowed for development, shall be paid into the Consolidated Revenue Fund, and that there shall be paid out of the Consolidated Revenue Fund for expenditure in or on account of North Australia and Central Australia such sums as may be appropriated by Parliament for this purpose.

Under Part V. the Governor-General may make regulations for the purposes, amongst others, of conferring certain powers on the Commission, and of more accurately defining those conferred on it by the Act.

Norfolk Island.

Prior to the 1st July, 1914, Norfolk Island was administered by the Governor of New South Wales. On the 1st July, 1914, Norfolk Island was placed under the authority of the Commonwealth. The

Norfolk Island Act 1913 provides for the acceptance of Norfolk Island as a territory under the authority of the Commonwealth and for the government thereof. By that Act the Governor-General is empowered to make ordinances and to appoint such judges, magistrates, and other officers as he thinks necessary, the ordinances to cease to have effect if disapproved by a resolution of which notice has been given within thirty days after the ordinance has been laid before Parliament. A right of appeal to the High Court is given from the decision of the Judge or Chief Magistrate, and on the appeal legal argument may be presented in writing so that the parties need not appear or be otherwise represented. Traffic in intoxicating liquor is prohibited. The Island is administered through the Prime Minister's Department by an Administrator and Chief Magistrate. There is an Advisory Council of twelve members, of whom six are elected by the residents, and six appointed by the Administrator. The powers and duties of this Council are defined by Ordinance No. 2 of 1925. The Council may transmit to the Administrator for submission to the Minister proposals for new ordinances or for the repeal or amendment of existing ordinances, and may itself make by-laws on certain local matters.

New Guinea.

New Guinea is held by the Commonwealth under mandate approved by the Council of the League of Nations, dated the 17th December, 1920. The mandate recites that His Majesty for and on behalf of the Commonwealth of Australia had agreed to accept it, and article two of the mandate grants to the mandatory full power of administration and legislation over the Territory as an integral part of the Commonwealth of Australia and power to apply the laws of the Commonwealth of Australia to the Territory subject to such local modifications as circumstances may require. The acceptance of the mandate by His Majesty is authorized by the Imperial Act, 9 & 10 Geo. V., c. 33, and the *Treaty of Peace Act* 1919 (cf. *Mainka* v. *Custodian of Expropriated Property*, 34 C.L.R. at p. 300). The *New Guinea Act* 1920 was passed with the object of making provision for the acceptance of the mandate to be issued, and of making immediate provision for the civil government of the Territory. The Act gives the Governor-General power to appoint an Administrator and to define his powers. It also gives the Governor-General power to make ordinances subject to their being disallowed by resolution of either House of Parliament, of which notice has been given within fifteen days of their being laid before Parliament. The Act also contains in section 15 a number of guarantees in accordance with the mandate and the Covenant of the League of Nations, and a direction that the Governor-General shall in each year make an annual report to the Council of the League of Nations containing full information as to the measures taken to carry out the requirements of that section, and as to the well-being and progress of the native inhabitants of the Territory.

Prior to the commencement of the *New Guinea Act* 1920, New Guinea had been under military occupation, and a great many ordinances and other enactments had been given the force of law by the military authorities. These ordinances and enactments were for the most part replaced by ordinances made by the Governor-General, and a number of Acts of the Commonwealth were applied to the Territory.

Certain of the ordinances made by the Governor-General conferred on the Administrator a power to make regulations or issue proclamations. This power has been frequently exercised. Inquiries have been addressed from time to time by the Mandates Commission of the League of Nations to the Commonwealth as the holder of a mandate, particularly with regard to the liquidation and disposal of ex-enemy property, the recruitment and employment of native labour under the indenture system, and the application of the *Immigration Act* 1901-1925. The Commonwealth also of its own motion appointed an officer, who had held the position of Chief Native Commissioner of Kenya Colony, to inquire into and report on matters affecting the welfare of the natives, and his report was forwarded by the Commonwealth Government to the Mandates Commission of the League. As regards the profits from the operations of the Expropriation Board it was found on inquiry by the Mandates Commission that they had not been paid into the Consolidated Revenue Account of the Commonwealth, and that in the year 1922-23 the Commonwealth had made a special grant of £10,000 to be expended exclusively on medical services, and that in each of the years 1925-26 and 1926-27 it had made a grant of £10,000 to be expended in the interests of the aboriginal natives.

As regards the recruitment of indentured labour it appeared that the mandatory power had found the system in operation when its military occupation commenced, and in its report on its ninth session the Commission noted with satisfaction the appointment of an inspector of native labour and the offer of the mandatory power to furnish the Commission with a summary of this officer's reports. The Commission had asked "whether in view of the paucity of the population and its stationary or decreasing character" the mandatory power would be prepared to contemplate the application of a less restricted immigration policy than that which it applies in its own territory. On this point the Commonwealth would make no concession, apparently believing that any relaxation of the Australian immigration regulations in respect of a territory administered under one of the "C" class of mandates might weaken the case for maintaining these regulations in respect of the Commonwealth itself. The Mandates Commission also criticized the application of the Navigation Act of the Commonwealth to the Mandated Territory as not in accordance with economic equality. The "C" mandates do not provide for economic equality nor do the relevant provisions of the Covenant of the League of Nations, but the application of the Navigation Act to New Guinea was cancelled by a proclamation as from the 1st September, 1925 (*see* Toynbee, *Survey of International Affairs*, 1926, pp. 398 *et seqq.*)

By the *Customs Tariff* (*Papua and New Guinea Preference*) 1926, as already mentioned in connexion with Papua, certain goods imported into Australia direct from New Guinea or Papua, if produced within either of these Territories, are to be free of duty.

For the purpose of improving the efficiency of the civil service in the Mandated Territory the Commonwealth Government has instituted a system of cadetships, with a probationary period of two years' systematic training in the field to be followed in the case of successful candidates by a course of training in anthropology at the University of Sydney. Education is carried out under the Education Ordinance of 1922, partly by the administration and partly by Missions (*see* Toynbee, *Survey of International Affairs*, 1926, p. 405).

Nauru.

A mandate for Nauru was granted to the British Empire and came into operation on receiving the approval of the Council of the League of Nations on the 17th December, 1920. The mandate is of the "C" class, but differs from other mandates of that class inasmuch as it was not granted to that one of the Allied Powers whose seat of government is situated nearest to the Territory subject to the mandate. Prior to the issue of the mandate an agreement dated the 2nd July, 1919, had been made between the Governments of the United Kingdom, the Commonwealth of Australia and the Dominion of New Zealand, which was approved by the Parliament of the Commonwealth by the *Nauru Island Agreement Act* 1919, assented to on the 28th October, 1919. The agreement provided for the appointment of an Administrator, that the term of office of the first Administrator should be for five years, that he should be appointed by the Australian Government and thereafter in such manner as the three Governments might decide, and that he should have power to make ordinances for the peace, order and good government of the Island. The agreement in addition provides for the appointment of a Board of Commissioners to consist of three members, one to be appointed by each of the governments which is a party to the agreement. The title to the phosphate deposits and to all land and buildings used in connexion therewith is to vest in the Commissioners, the title of the former owner, the Pacific Phosphate Company, being converted into a claim for compensation, which has now been paid. The deposits are to be worked and sold under the direction, management and control of the Commissioners, but they are to dispose of the phosphates for the purpose of the agricultural requirements of the United Kingdom, Australia, and New Zealand, so far as the same shall extend and at a price calculated so that the proceeds of sale will cover working expenses, cost of management, administrative expenses, sinking fund, and other purposes. The proportions in which each of the parties to the agreement is to receive phosphates is fixed by the agreement, and each of the three governments concerned binds itself not to interfere with the direction, management, or control of the business of working, shipping, or selling the phosphates.

The first Administrator was duly appointed by the Australian Government and assumed duty in June, 1921. His appointment was afterwards renewed for a further term of five years, to date from the expiration of his first appointment. By a supplementary agreement between the three parties to the agreement it was laid down that the responsibility for the exercise of the British Empire mandate over Nauru should lie with that one of the three parties which had appointed the Administrator in office at any given moment. Questions by the League of Nations Commission relating to the administration of Nauru are therefore answered by the accredited representatives of Australia in the presence of the accredited representatives of New Zealand and the United Kingdom, whenever these representatives are available at Geneva at the same time. The Government of Australia reports on the administration of the Island to the League of Nations, and in the report for 1925 it was stated that "the functions of the Commissioners, so far as Nauru is concerned, are limited to the business connected with the phosphate deposits. The Administrator is responsible for all matters pertaining to the government, moral and social welfare, labour

conditions, &c., of all people on the Island—the British Phosphate Commission being treated, from a governmental point of view, as if it were a private company."

The Seat of Government.

Section 125 of the Constitution provides that the seat of government shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than 100 miles from Sydney. By the *Seat of Government Act* 1904 (the Dalgety Act), the Commonwealth Parliament determined that the seat of government of the Commonwealth should be within 17 miles of Dalgety, in the State of New South Wales, and should contain an area of not less than 900 square miles and have access to the sea. To that decision objections were taken by the State of New South Wales, and the Act of 1904 was in consequence repealed. In 1908 a bill was introduced defining the area to be acquired from New South Wales with greater clearness, but re-affirming the decision to build the capital in the neighbourhood of Dalgety. Before this bill was disposed of, an open exhaustive ballot was held in the House of Representatives to decide which of eleven capital sites should be chosen for the seat of government. After the ninth ballot the district of Yass-Canberra was chosen, and a bill to give effect to this decision was introduced by the succeeding government. This bill was passed as the *Seat of Government Act* 1908. That was followed by the *Seat of Government Acceptance Act* 1909, which came into force by proclamation on the 22nd January, 1910. This Act ratified and confirmed an agreement made on the 18th October, 1909, between the Commonwealth of the one part and the State of New South Wales of the other part by which the State agreed to surrender and the Commonwealth to accept the Yass-Canberra territory as Federal Territory, within which the Seat of Government is established.

On the 12th March, 1913, an official ceremony took place to mark the initiation of operations in connexion with the establishment of the Seat of Government, and the selection of Canberra as the name of the capital city was announced. In 1915 the Commonwealth also acquired sovereign rights over about 28 square miles of land and water, at Jervis Bay, which were acquired by the Commonwealth from the State of New South Wales to provide a site for a naval college and a port for the Federal Territory.

In 1914 a line between Canberra and Queanbeyan in the State of New South Wales was opened for goods traffic, and on the 15th October, 1923, the line was thrown open for passenger traffic. The line was worked by the Railway Commissioners of New South Wales for and on behalf of the Commonwealth until the 1st July, 1928, when the management was taken over by the Commonwealth Railway Commissioner.

On the 24th March, 1927, the Senate and the House of Representatives, which had sat in Melbourne since the establishment of the Commonwealth, resolved that the next meeting of Parliament should be at Canberra on the 9th May, 1927. On that day Parliament House

at Canberra was officially opened. The sittings were brief, largely owing to the transfer from Melbourne not being sufficiently advanced, and the session was not resumed until the 28th September, 1927. It was not thought expedient for Parliament once having sat in Canberra to sit again in Melbourne.

The first Act dealing with the administration of the Seat of Government was the *Seat of Government (Administration) Act* 1910, which came into force on the 1st January, 1911. That Act gave the Governor-General the power to make ordinances having the force of law in the Territory, but subject to disallowance by a resolution of either House of Parliament, of which notice has been given within fifteen sitting days after the ordinance in question had been laid before Parliament. It also provided that certain New South Wales Acts, of which the most important were the *Local Government Act* 1906 and the Acts relating to industrial disputes, should not apply to the Territory, and that certain Acts of the Commonwealth Parliament, of which the most important was the *Commonwealth Conciliation and Arbitration Act* 1904-1910, should apply. With these exceptions the laws in force in New South Wales on the 1st January, 1911, applied as if they were laws of the Territory.

The Territory was administered by Commonwealth Departments until the end of 1924. By the *Seat of Government (Administration) Act* 1924, which came into force on the 1st January, 1925, as amended by the *Seat of Government (Administration) Act* 1926, which came into force on the 3rd September, 1926, the administration of the Territory was entrusted to a Federal Capital Commission of three members, to be appointed by the Governor-General, one of whom was to be the Chief Commissioner. The Commissioners have power to manage Crown lands not required by the Commonwealth for any public purpose, and have generally the powers of a local government body, including power to levy rates. They have power to borrow money, if the Parliament consents by a resolution of both Houses, and the Treasurer may borrow money on behalf of the Commission, if authorized by an Act of Parliament or by a resolution of both Houses. The Governor-General may make regulations for the purpose, amongst others, of more accurately defining the powers conferred on the Commission by the Act.

This system has been modified by the *Seat of Government (Administration) Act* 1928, which came into force on the 29th December, 1928, and under which one Commissioner with limited powers is to be elected by owners and occupiers of property in the Territory. With this exception there is at present no elective body in the Territory, and the citizens have no franchise. The laws in force in the Territory are those of New South Wales as they existed in 1911, with the exceptions already noted. The New South Wales Department of Public Instruction continues to provide educational facilities, the cost being paid by the Commission. By an ordinance of 1927, which came into force on the 28th September, 1927, a police force has been established, the work of policing the Territory having previously been carried on by members of the police force of New South Wales.

Industrial disputes are determined by a form of wages board, which consists of an independent chairman and of representatives of both parties to the dispute. Pending the appointment of a local magistrate ordinary litigation takes place before the New South Wales magistrate sitting at Queanbeyan, but difficulties have arisen with regard to the service and execution of process and the recovery of debts.

It has been suggested that should Parliament sit elsewhere than at Canberra, laws passed during such sittings might be invalid. This suggestion does not seem to be warranted by any provision of the Constitution. Section 125 provided that the Parliament should sit at Melbourne until it met at the Seat of Government, and although by section 5 the Governor-General may appoint such times for holding the sessions of the Parliament as he may think fit, he is nowhere empowered to appoint the place at which these sessions shall be held. It appears to be clear that Parliament was not intended to sit elsewhere than at Canberra, after it had once met there, but the sanction for these provisions appears to be political and not legal.

VIII.—THE LEGISLATIVE POWER OF THE COMMONWEALTH.

The Commonwealth of Australia Constitution Act and other British Statutes.

The legislative power of the Commonwealth depends primarily on the Commonwealth of Australia Constitution Act, which embodies and gives legal effect to the Constitution. In regard to various matters, however, power to make laws is conferred on the Parliament of the Commonwealth, as well as on the legislatures of other parts of the Empire, by a number of British statutes, including, for example, the *Colonial Courts of Admiralty Act*, 1890 (s. 3), and the *Merchant Shipping Act*, 1894 (s. 736).

The constitutional status of the Commonwealth as a self-governing Dominion.

From a legal point of view the powers of the Commonwealth Parliament are subject to the right of the Crown to withhold assent to any bill reserved by the Governor-General, or to disallow any Act within one year after it has received his assent (ss. 58, 59), while in virtue of the supremacy of the British Parliament any legislation passed by the Commonwealth Parliament may be repealed or varied at any time by an Act of the British Parliament. In fact, however, in virtue of the equality of status which, from a constitutional as distinct from a legal point of view, now exists between Great Britain and the self-governing Dominions as members of the British Commonwealth of Nations, and on the principles which are set out in the report submitted by the Inter-Imperial Relations Committee to the Imperial Conference in 1926, it would not be in accordance with constitutional practice either for British Ministers to tender advice to the Crown against the views of Australian Ministers in any matter appertaining to the affairs of the Commonwealth, or for the British Parliament to pass legislation applying to the Commonwealth without its consent. This statement of principles was not intended to apply to provisions in any constitution or statute which expressly require bills to be reserved for the royal assent. Provisions of that nature are to be considered by an expert committee, which is to meet shortly and is to make recommendations, after inquiry, concerning existing statutory provisions which require reservation of Dominion legislation for the assent of His Majesty or authorize the disallowance of such legislation.

The government of the Commonwealth and the Territories. Plenary powers.

The Commonwealth Parliament may make laws for the peace order and good government of the Commonwealth with respect to the matters which come within the enumerated powers (ss. 51, 52). It has an independent and general power to make laws for the government of the Territories (s. 122; *Buchanan* v. *Commonwealth*, 16 C.L.R. 315; *R.* v. *Bernasconi*, 19 C.L.R. 629). The difference in scope between its powers in regard to the Commonwealth and its powers in regard to the Territories does not affect the plenary nature of the authority conferred by the enumerated powers. The Commonwealth Parliament is not a delegate of the British Parliament bound to exercise all its functions itself and

without power to entrust any of them to other persons or bodies. The principle as to the nature of self-government affirmed by the Privy Council in *Powell* v. *Apollo Candle Co.* (10 A.C. 289-290) in regard to the State legislatures before Federation applies equally to the Commonwealth Parliament. Its authority is restricted by the Constitution itself, but within the limits of area and subject-matter it has powers of legislation as ample, and of the same nature, as those of the British Parliament (*cf. R.* v. *Burah,* 3 A.C. at p. 904; *Hodge* v. *The Queen,* 9 A.C. at p. 132; the *Engineers'* case, 28 C.L.R. at p. 153). It may choose its own methods and means to attain any objects within its powers, and the validity of an enactment directed to those objects cannot be challenged on the ground that it is not calculated as matter of fact or policy to secure peace order and good government (*Riel* v. *The Queen,* 10 A.C. at p. 678).

Territorial and extra-territorial powers. The Colonial Laws Validity Act, 1865.

The powers of the Commonwealth Parliament are subject to two restrictions of a general character, one being the principle stated by the Privy Council in *MacLeod* v. *Attorney-General for New South Wales* (1891 A.C. at p. 458) as to the territorial nature of the powers conferred by the British Parliament on the legislatures of different parts of the Empire, and the other being the declaration made by the British Parliament in the *Colonial Laws Validity Act,* 1865, as to the effect of repugnancy between enactments of such legislatures and enactments of the British Parliament intended to apply to the parts of the Empire for which those legislatures have been established.

On the principle stated in *MacLeod's* case the authority of the Commonwealth Parliament is, in general, confined within territorial limits. Where, however, a power of the Parliament cannot otherwise be exercised effectively, as, for example, in the case of a power to expel, the power will extend beyond those limits (*Attorney-General for Canada* v. *Cain and Gilhula,* 1906 A.C. 542; *Robtelmes* v. *Brennan,* 4 C.L.R. 395). Moreover, entry into the Commonwealth after an offence has been committed elsewhere may, in some circumstances at least, be made an offence (*P. and O. Steam Navigation Co.* v. *Kingston*—the "broken seals" case, 1903 A.C. 471). There are, too, provisions in a number of British statutes which, expressly or by necessary implication, extend the authority of the Commonwealth Parliament beyond territorial limits. These include (*a*) covering clause 5, so far as it deals with British ships; (*b*) the provisions of the Constitution with respect to naval and military defence, fisheries in Australian waters beyond territorial limits, external affairs, and the relations of the Commonwealth with the islands in the Pacific (s. 51 (vi); cf. *Sickerdick* v. *Ashton,* 25 C.L.R. 506; s. 51 (x), (xxix) and (xxx)); and (*c*) the provisions in various statutes dealing with matters of general concern to the Dominions, among them being the *Army Act* 1881 (s. 177) and the *Naval Discipline (Dominion Forces) Act* 1911 (s. 1). The question of enlarging the competence of Dominion Parliaments to give their legislation extra-territorial operation was considered at the Imperial Conference in 1926. It may be practicable for Great Britain and the Dominions to find a convenient method for giving effect to the principle which is suggested in the report of the Inter-Imperial

Relations Committee, that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace order and good government of the Dominion. It does not appear desirable to go beyond that principle in view of the difficulties that might arise between the Dominions, or between the Empire and foreign countries.

Under the *Colonial Laws Validity Act,* 1865, the Commonwealth Parliament cannot override British legislation which is intended to apply to the Commonwealth either (*a*) specifically, as in the case of the Commonwealth of Australia Constitution Act; or (*b*) in common with other Dominions, as in the case of the *Foreign Enlistment Act,* 1870. Subject to this exception it may pass legislation inconsistent with either the statute law or the common law in force in Great Britain. The Act serves to reconcile the autonomy of the Dominions with the unity of the Empire. Any suggestion to alter the provisions of the Act will need full and grave consideration, as indeed is implied, if not expressed, in the passages of the report of the Inter-Imperial Relations Committee which deal with the question.

Powers in sections 51 *and* 52 *subject to the Constitution.*

The powers enumerated in sections 51 and 52 are expressly made subject to the Constitution. The Commonwealth Parliament cannot, under these powers, pass legislation which goes beyond the limits which are involved in the enumeration, or beyond those which are to be found, in the case of particular powers, in the special provisions applicable to them. The distribution of powers has been put into the Constitution by the people of Australia, and the Commonwealth Parliament cannot merely of its own motion legislate so as to alter that distribution (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.,* 17 C.L.R. at p. 655). If its legislation exceeds the prescribed limits, it will, at least to the extent of the excess, be invalid. When a question arises whether the limits have been exceeded, it will be the duty of the appropriate Courts to determine the question (the *Engineers'* case, 28 C.L.R. at p. 149).

No implied prohibition against interference with State instrumentalities.

Each of the enumerated powers is complete in itself, and may be exercised to its utmost extent, without "implied prohibition" against any exercise which might interfere with "State instrumentalities"—for example, with State railways (the *Engineers'* case, 28 C.L.R. at pp. 146, 150-152, 157-160, over-ruling the *Railway Servants'* case, 4 C.L.R. 488). Before the *Engineers'* case the High Court took the view that in determining the scope of a power under a federal system of government regard was to be had to the necessity of mutual non-interference between Federal and State authorities (*D'Emden* v. *Pedder,* 1 C.L.R. pp. 110-113; the *Railway Servants'* case, 4 C.L.R. pp. 537-539; *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth,* 20 C.L.R. p. 163). In the *Engineers'* case the Court rejected this principle as involving "questions of expediency or political exigency which this Court is neither intended to consider nor equipped with the means of determining" (28 C.L.R. at p. 160; *cf.* pp. 144-146, 150-152, 157-159).

Incidental powers.

Each of the enumerated powers is to be read with the provisions as to "incidental powers". Under paragraph (xxxix) of section 51 the Commonwealth Parliament may make laws with respect to matters incidental to the execution of any power vested by the Constitution (*a*) in the Parliament; (*b*) in either House; (*c*) in the Government of the Commonwealth; (*d*) in the Federal Judicature; or (*e*) in any department or officer of the Commonwealth. As regards any power of legislation, the Parliament would apparently have been able to make laws with respect to matters incidental to its exercise, even if paragraph (xxxix) were not in the Constitution, as the grant of a power implies that it may be exercised completely and effectually, and, therefore, that anything may be done which is necessary for that purpose. But the express grant of incidental powers, which is similar to that in the American Constitution, makes assurance doubly sure (*G. C. Crespin & Son* v. *Colac Co-operative Farmers, Ltd.*, 21 C.L.R. at 214). Paragraph (xxxix) also makes it clear that the incidental powers are to extend to administrative and judicial powers as well as to legislative powers (*R.* v. *Kidman*, 20 C.L.R. at p. 443). It covers a great variety of legislation—for example, criminal legislation in regard to federal matters, legislation creating an offence under one of the enumerated powers and directing that a person who is accused of the offence and is within the power must prove his innocence, and legislation under which a regulation may be made fixing the price of bread in war time in particular localities (*cf. Williamson* v. *Ah On*, 39. C.L.R. 95; *Farey* v. *Burvett*, 21 C.L.R. 433). But paragraph (xxxix) has its limits. It does not confer an additional power. It does not do more than cover matters which are incidents in the exercise of some actually existing power; it applies only in relation to powers which are vested in the Parliament or other Federal authority, and not to powers which are merely capable of being acquired by an alteration of the Constitution, and it applies only in relation to a power which has been actually exercised (*Colonial Sugar Refining Co., Ltd.* v. *Attorney-General for the Commonwealth*, 17 C.L.R. at 655; *ex parte Walsh and Johnson, in re Yates*, 37 C.L.R. 36).

The distribution of powers between the Commonwealth and State Parliaments.

In giving specific subject-matters to the Commonwealth Parliament and leaving everything else to the State Parliaments, the framers of the Constitution adopted a simple method of distribution, under which the dividing line between the Federal and State spheres is ascertained by examining the list of subject-matters assigned to the Commonwealth Parliament. The choice between giving the specific or the residuary powers to the Commonwealth Parliament does not itself determine the the relative importance or extent of the two spheres. That question depends upon the nature and scope of the specific powers. The method of distribution adopted in the Constitution is convenient as well as simple, as it leaves room for the principle of concurrent powers in regard to matters on which it is desirable that the Commonwealth Parliament should have power to make laws, but in regard to which it is not desirable either to affect existing State legislation or the power of a State Parliament to pass further legislation, until the Commonwealth Parliament sees fit to occupy the field.

The powers in section 51.

The main grant of powers to the Commonwealth Parliament is in section 51. The grant is not based on abstract principles, but is the practical solution which commended itself to the framers of the Constitution in the light of the history and circumstances of Australia, and the need for compromise in order to reconcile divergent views and obtain agreement. The powers differ in nature and purpose as well as in origin. Some of them, *e.g.*, the powers as to defence, external affairs, naturalization of aliens, taxation (including the control of customs), and borrowing on the credit of the Commonwealth, are obviously appropriate to a central legislature. Some, *e.g.*, the powers as to bills of exchange and promissory notes, are designed to secure the advantages of uniform law. Some, *e.g.*, the powers as to postal, telegraphic, telephonic, and other like services, are modelled on the provisions of the American and Canadian Constitutions, with such additions as appeared to be required in order to include modern developments. Some, *e.g.*, the powers as to marriage and divorce, follow the Canadian precedent in view of the experience of the United States through the omission to grant them to Congress. Some, *e.g.*, the powers as to invalid and old-age pensions, and industrial arbitration, are Australian innovations. One, namely the power in paragraph (xxxvi), which relates to matters in respect of which the Constitution makes provision " until the Parliament otherwise provides ", leaves to the Commonwealth Parliament numerous matters in regard to which it was necessary or desirable to have some provision in the Constitution from the establishment of the Commonwealth, but it was not practicable, or not expedient, to stereotype either principles or details (*cf.* ss. 7, 10, 22, 24, 29, 30, 31, 34, 39, 46, 47, 48, 49, 65, 66, 67, 73, 87).

Concurrent powers.

In regard to most of the 39 matters enumerated in section 51, including, *e.g.*, banking other than State banking, insurance other than State insurance, weights and measures, bills of exchange and promissory notes, copyrights, patents and trade marks, bankruptcy and insolvency, marriage, divorce and matrimonial causes, the power of the Commonwealth Parliament is a concurrent power, and the powers of a State Parliament are not affected until the Commonwealth Parliament occupies the field. But some of the matters mentioned in the section are from their very nature within the exclusive power of the Commonwealth Parliament, *e.g.*, borrowing money on the public credit of the Commonwealth, fisheries in Australian waters beyond territorial limits, the service and execution throughout the Commonwealth of State process and judgments, and the relations of the Commonwealth with the islands of the Pacific (*cf.* Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, p. 656). Some are expressly declared by other sections of the Constitution to be matters in regard to which the Commonwealth Parliament is to have exclusive power, *e.g.*, customs and excise (s. 51 (ii); s. 90). Some are expressly withdrawn from a State, *e.g.*, a State is not to coin money, or to make anything but gold and silver coin a legal tender in payment of debts (s. 51 (xii); s. 115).

Exclusive powers.

Matters within the exclusive power of the Commonwealth Parliament are mentioned or referred to in section 52. Under that section the Commonwealth Parliament has exclusive power to make laws with

respect to (*a*) the seat of government of the Commonwealth and all places acquired by the Commonwealth for public purposes; (*b*) matters relating to transferred departments; and (*c*) other matters declared by the Constitution to be within the exclusive power of the Commonwealth Parliament. This enumeration is not exhaustive, for, as already mentioned, several of the matters enumerated in section 51 are for different reasons within the exclusive power of the Commonwealth Parliament.

The determination of the seat of government is dealt with in a separate section, under which the seat of government is to be within territory granted to or acquired by the Commonwealth (s. 125). Once it is determined, as it has been, under that section, the Commonwealth Parliament has under section 52 exclusive power to make laws for the government of the territory, a power which is similar to that in the American Constitution, the object in each case being to preclude any possibility of the freedom of action of the central government being fettered by any State.

Paragraph (i) of section 52 couples with the seat of government "all places acquired by the Commonwealth for public purposes". The High Court has not yet decided whether these words mean places acquired as territory, or places acquired as property, or both, though in *Commonwealth* v. *New South Wales* (33 C.L.R. at pp. 46, 53, 60) the question was touched on by two judges, who took different views. Apparently the general opinion since the decision of the Supreme Court of New South Wales in *Rex* v. *Bamford* (1 S. R. (N.S.W.) 33) has been that the words include places acquired as property, even though not acquired as territory—for instance, public buildings, post offices, forts, dockyards, arsenals and aerodromes (*see* the evidence of Sir Robert Garran, pp. 108-109). The fact of any such place being acquired by the Commonwealth for public purposes and so coming within the exclusive power of the Commonwealth Parliament does not displace existing State laws, as under s. 108 these laws continue until the Commonwealth Parliament legislates, except where the Constitution has made other provision—*e.g.*, in section 90, under which State laws imposing duties of customs or of excise were to cease on the imposition of uniform duties of customs. The High Court has not yet decided whether the Commonwealth Parliament has control for federal purposes only, or whether its power completely excludes a State Parliament from legislating in regard to such places.

The provision in paragraph (ii) of section 52 giving the Commonwealth Parliament exclusive power with respect to "matters relating to" any transferred department clearly covers matters concerning the working of the department, and in some judgments in the High Court the provision is regarded as extending to the subjects with which the department has to deal, or at least as helping to indicate that the Commonwealth Parliament has exclusive powers in regard to those subjects (*cf. Joseph* v. *Colonial Treasurer,* 25 C.L.R. 46).

As to paragraph (iii) of section 52 the only matters expressly declared to be within the exclusive power of the Commonwealth Parliament are customs and excise duties (s. 90), bounties on the production or export of goods—subject to certain qualifications (ss. 90, 91), and jurisdiction over any part of a State which is surrendered to the Commonwealth (s. 111).

Powers compared with those of the Congress of the United States of America.

The Commonwealth Parliament can legislate on many matters which are outside the powers of the Congress of the United States, and on some matters which are outside the powers of the Parliament of Canada. As the powers are distributed in the American Constitution under the same method as that in the Australian Constitution, while the method in the Canadian Constitution is different as well as complex, it is easier to compare the powers of the Commonwealth Parliament with those of Congress than with those of the Canadian Parliament. The matters which are specifically assigned to the Commonwealth Parliament but which are not assigned to Congress, or are only assigned to it in part and as incident to a specified subject matter (*e.g.*, the regulation of foreign and interstate trade), include bounties on the production or export of goods, insurance, bills of exchange and promissory notes, marriage, divorce and matrimonial causes, invalid and old-age pensions, the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States, the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws, the acquisition of railways from a State, railway construction and extension in a State, and conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Moreover the powers of the Commonwealth Parliament extend to the numerous matters in respect of which the Constitution makes provision "until the Parliament otherwise provides" (s. 51 (xxxvi)).

Both the American and the Australian Constitutions leave internal trade and commerce to the States, and both have provisions, though not identical provisions, which restrict the power of the central legislature in regard to discriminatory taxation and the giving of preference by any law or regulation of trade, commerce or revenue. Under neither Constitution has the central government power to annul or disallow the legislation of a State Parliament.

In comparing the Commonwealth Constitution with the American Constitution it is important to bear in mind not only the list of subjects assigned to the central legislature (*cf.* sections 51 and 52 of the Commonwealth Constitution, and Article 1, sections 1 and 8, of the Constitution of the United States), but also the express prohibitions which are contained in the American Constitution but have no counterpart in Australia. The most important of them are set out in Article 1, sections 9 and 10 (subject to the amendment made in clause 4 of section 9 by the Sixteenth Amendment), and in the Fourteenth Amendment. Some apply to Congress, or to both Congress and the State Legislatures, but a number, including the provisions which forbid legislation impairing the obligation of contracts or the depriving of any person of property without due process of law, are specially addressed to the States. As Congress can only legislate on the subjects assigned to it, and within the limitations and subject to the prohibitions applying to its powers, the prohibitions which are addressed to the States, and which restrict the general power of legislation otherwise reserved to them, preclude in effect any legislation in the United States of the character described in the prohibitions, unless and until the Constitution is amended, and they have in fact stood in the way of much social

legislation. In Australia, in the absence of these prohibitions, the question in regard to similar legislation is whether it comes within the sphere of the Commonwealth Parliament or within the sphere of a State Parliament, and not whether it is beyond the competence of both legislatures.

Another fundamental difference between the two Constitutions is in regard to "implied prohibitions" against interference with State instrumentalities. The Supreme Court of the United States apparently regards the principle of mutual non-interference between Federal and State authorities as essential to the satisfactory working of the American Constitution, while the High Court of Australia has decided that it is inapplicable to the Commonwealth Constitution.

Powers compared with those of the Parliament of Canada.

In the Canadian Constitution there are two sets of enumerated powers—a set for the Provincial Legislatures in relation to the sixteen subjects in section 92, and a set for the Dominion Parliament in relation to the twenty-nine subjects in section 91. A general or residuary power is also given to the Dominion Parliament in relation to all matters not coming within the enumerated powers of the Provincial Legislatures.

A valuable analysis and discussion of this complex scheme is given in the evidence of Sir Robert Garran, where an account is given of the ingenious attempts, by judicial decision, to reconcile two sets of mutually exclusive powers, which are found in practice to overlap.

> "The Canadian system has always appeared to me to be one of extreme complexity, and with the permission of the Commission I will read a note I have written on this subject, which is contained in Sir John Quick's work, *Legislative Powers of the Commonwealth of Australia,* at page 108. As this is a technical subject, I think the best way for me to express it is by reading the following, which appears on page 109:—
>
> 'The provisions of the Canadian Constitution as to the distribution of power are extremely complex. The leading principles are—(1) That the subject-matters of Provincial legislation are specific, those of the Dominion Parliament partly specific and partly residuary. (2) That the powers both of Dominion and Provinces are mutually exclusive.' Instead of leaving a concurrent power in the Provinces until the legislative power was exercised by the Dominion, the framers of the Canadian Constitution attempted to make each set of powers exclusive of the other. The note continues—
>
> 'Both these principles, however, require to be stated with very important qualifications. In the first place the Constitution attempts to enumerate specifically some of the powers of the Dominion Parliament. We thus have two sets of enumerated powers, mutually exclusive; and yet these two fields are found in practice to overlap. The result has been a series of ingenious attempts, by judicial decision, to reconcile the two, with results which may be shortly stated as follows:—Where there is overlapping of enumerated powers, the field is "concurrent", and

where in this concurrent field Dominion and Provincial legislation clash, the Provincial legislation to that extent gives way. Thus the specific powers of the Provinces are in a sense residuary. Dominion laws which are "ancillary" to either the residuary or the specific powers of the Dominion Parliament are valid even though they incidentally encroach on the specific powers of the Provinces.

The following is an analysis of the mode of distribution:—

Dominion Legislative Powers.

(1) General (residuary) power given by section 91—to make laws for the peace, &c., of Canada in relation to all matters not enumerated in section 92 as exclusive powers of the Provinces. This power can only be exercised for matters national in character, and not comprised in the enumerated powers of the Provinces (*Attorney-General for Ontario* v. *Attorney-General for Canada,* 1896 A.C., p. 348).

(2) Matters enumerated in section 91. These are not deemed to come within any of the sixteen classes enumerated in section 92: *Attorney-General for Ontario* v. *Attorney-General for Canada* (*supra*), overruling dictum in *Citizens Insurance Co.* v. *Parsons,* 7 A.C., where it was held that this provision only applied to class 16 of section 92.

(3) Matters 'ancillary' to residuary or enumerated powers.

Provincial Legislative Powers.

These are matters enumerated in section 92, but exclusive of matters enumerated in section 91.

The Dominion has two kinds of legislative power—residuary and specific. The Provinces have one kind of legislative power, which is specific, but is at the same time residuary in the sense that it only covers so much of the enumerated matters in section 92 as are not included in the enumerated matters in section 91.

Concurrent Powers.

Though there are no subject-matters of express concurrent power (with one exception relating to agriculture) the existence of what is really a concurrent field has been established by judicial decision. Though the enumerated powers of the Dominion and the Provinces are expressed as exclusive, they overlap.

Where there is over-lapping of enumerated powers of the Dominion and the Provinces respectively, neither legislation will be *ultra vires* if the field is clear; if on this 'concurrent' field the two legislations meet, Dominion legislation prevails'" (*see* the evidence of Sir Robert Garran, pp. 44–45).

The Dominion Parliament has a number of specific powers which correspond more or less closely with specific powers of the Commonwealth Parliament, including power to make laws in relation to the borrowing of money on the public credit, defence, postal service, census and statistics, beacons, buoys and lighthouses, quarantine, currency and coinage, legal tender, weights and measures, bills of exchange and promissory notes, bankruptcy and insolvency, patents of invention and

discovery, copyrights, naturalization and aliens, and marriage and divorce. Under the general power of the Dominion Parliament over non-provincial subjects it may make laws in relation to some of the other matters, e.g., astronomical and meteorological observations, and insurance, which are specifically assigned to the Commonwealth Parliament. The Dominion Parliament has also some specific powers which differ in important respects from the specific powers of the Commonwealth Parliament, and especially in regard to trade and commerce, and taxation. The power in regard to trade and commerce is a power to regulate but not to prohibit, and it extends to internal as well as to external trade and commerce, though not to matters connected with trade and commerce which come within the exclusive sphere of the Provincial Legislatures. The power to tax is free from any restriction against discriminating between provinces or parts of provinces. The Dominion Parliament has, moreover, specific powers in regard to some matters which are not specifically assigned to the Commonwealth Parliament, including (*a*) shipping and navigation; (*b*) lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting provinces or extending beyond the limits of a province; (*c*) lines of steamships between a province and any British or foreign country; (*d*) such matters as, although wholly situate within a province, are before or after their execution declared by the Dominion Parliament to be for the general advantage of Canada or for the advantage of two or more provinces; (*e*) Indians, and lands reserved for the Indians; and (*f*) the general criminal law.

On the other hand the Commonwealth Parliament has several specific powers which do not come, either at all or at least to their full extent, within the specific or the general powers of the Dominion Parliament. These powers of the Commonwealth Parliament include power to make laws with respect to the people of a particular race, fisheries beyond territorial limits, external affairs, and relations with the islands of the Pacific.

As compared with the powers of the Dominion Parliament, the powers of the Provincial Legislatures are defined within narrow limits (*British North America Act,* 1867, s. 92). The Dominion Government may disallow the legislation of a Provincial Legislature (*ibid.,* s. 90).

Powers compared with those of the Federation in the Federal Republic of Austria.

Whatever view may be taken as to the importance or extent of the powers of the Commonwealth Parliament as compared with those of Congress in the United States, or with the Dominion Parliament in Canada, its powers are not as wide or numerous as in some of the Constitutions which have been framed in other countries in recent years—for example, in the Constitution of the Federal Republic of Austria, which was drawn up in 1919. The distribution of powers under that Constitution is described in the evidence of Professor Bailey, Professor of Jurisprudence in the University of Melbourne (p. 1407) :—

"Like our own, it is a Constitution in which the enumerated powers are those of the Federation, the residuary powers are those of the States. But while recognizing the necessity for maintaining

the State organizations it yields far more than our own Constitution to the demand for uniformity. The powers of the Federation then, which are very great, are divided as follows:—With respect to one group of matters, the Federation has both legislative and executive powers, including the power to make regulations. With respect to a second group of matters, the Federation has legislative powers, but execution of these laws lies with the States. With respect to a third group of matters, the Federation may legislate as to fundamental principles only; the legislative power to apply them, and the executive power to enforce them are vested in the States.

The contents of each of these groups may perhaps be of some interest. The matters with respect to which the Federation has both legislative and executive power include practically all the matters set out in section 51 of the Constitution of the Commonwealth. But they do not stop there. They include also civil law (including company law), the press, the law of associations and assemblies, monopolies, labour legislation (except in respect of agriculture and forestry), public hygiene, food supply, including food control, transport by rail, by water and by air, including tramways declared to be Federal routes. Even the administration of justice is swept into the Federal net.

The second group of matters, with respect to which the Federal Government has full legislative power, but must depend on the States for the execution of its laws and regulations, embraces citizenship, domicile and personal status, munitions, weapons and motor vehicles; housing, and supervision of local taxation to prevent double taxation or other unnecessary burdens, to prevent impediments to commercial intercourse or economic relations with foreign countries, or between provinces or parts of provinces, and to prevent the imposition of charges which are excessive or likely to impede traffic upon or the use of public traffic routes.

Finally, through its legislative power in respect of principles, the Federal Government may prescribe the limits within which the State authorities are free to act, with regard to a great number of matters. They include such subjects as the organization of the administration of States; poor relief; hospitals and nursing homes and health resorts; the care of mothers, infants and children; labour laws in forestry and agriculture; building and forestry, including the protection of plants from diseases and pests. Whether this power to legislate upon "fundamental principles only" is one susceptible of confinement within any legal limits, or whether it will develop in such a way as to leave the States no substantial discretion, is a matter on which no evidence seems yet procurable. To Australian eyes it looks unworkable."

Matters in respect of which the Commonwealth Constitution makes provision until the Parliament otherwise provides.

The power conferred on the Commonwealth Parliament to make laws on matters in respect of which the Constitution makes provision "until the Parliament otherwise provides" is important. Paragraph (xxxvi) of section 51 makes it clear that the Commonwealth Parliament may legislate on the numerous matters in regard to which those words

are used. All the provisions governed by those words, including the whole or part of sections 3, 7, 22, 24, 29, 31, 34, 39, 46, 47, 48, 49, 73, 87, and 96, remain in force only until the Commonwealth Parliament sees fit to vary or supersede them. So far as these provisions are concerned, the Constitution is flexible, that is, the principles or details which are subject to the words "until the Parliament otherwise provides" may be altered by the ordinary process of legislation, and without the approval of the electors being obtained under section 128. Any constitution which cannot be altered as to the whole of its provisions in the same way as any other law, is, strictly, a rigid constitution in the sense made familiar by Bryce and Dicey, but the degree of rigidity may vary indefinitely, from that of a constitution which partakes of the nature of a treaty and is unalterable except with the assent of all the parties, to that of a constitution in which almost the whole of its provisions may be altered as easily, or nearly as easily, as any other law. The people of the six self-governing Colonies, who were agreeing to unite in a Federal Commonwealth, were accustomed to virtually flexible constitutions. The framers of the Commonwealth Constitution had before them the Canadian Constitution, which does not provide the means for its own alteration, except for certain limited purposes, and can only be altered by the British Parliament, and the American Constitution, which provides means for alteration but makes alteration difficult. They were confronted with the problem of safeguarding the pact of union, securing as much flexibility as was consistent with the safeguards, and at the same time providing means for altering the pact in Australia without going to the British Parliament for fresh authority. "No doubt the Act of 1900 contains large powers of moulding the Constitution. Those who framed it intended to give Australia the largest capacity of dealing with her own affairs, and the Imperial Act enables her to act without coming to the mother Parliament" (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Company Limited,* 17 C.L.R. at p. 655—in the judgment of the Judicial Committee of the Privy Council delivered by Viscount Haldane, Lord Chancellor). But apart from alteration by a referendum under section 128, the framers of the Constitution had recourse in a large number of its provisions to the principle of giving the Commonwealth Parliament itself power to deal with a variety of matters, including those to which the words "until the Parliament otherwise provides" apply, and sought to frame a polity which should have the merits both of a rigid and a flexible constitution (Dicey, *Law of the Constitution,* 8th edn., 1920, appendix, pp. 533-535).

Matters on which the Commonwealth Parliament may legislate, including matters affecting the Parliament itself, the executive government of the Commonwealth, and the judicial system of the Commonwealth and the States.

The Commonwealth Parliament may legislate on a number of matters affecting the Parliament itself, the executive government of the Commonwealth, and the judicial system of the Commonwealth and the States. As regards matters affecting itself it may determine whether the senators for each State are to be chosen by the people of the State voting as one electorate or voting in some other way; increase or diminish the number of senators for each State, subject to the provisions of the Constitution with respect to equal representation, and

minimum representation, of the original States; and prescribe the method of choosing senators, subject to the method being uniform for all the States (ss. 7, 9). The number of the members of the House of Representatives is to be, as nearly as practicable, twice the number of the senators (s. 24). Members are to be allotted to the States on the basis of population (ss. 24, 25). Subject to these requirements of the Constitution the Commonwealth Parliament may determine the manner in which the number for each State is to be ascertained, and may increase or diminish the number of the members of the House of Representatives (ss. 24, 27). It may determine the electoral divisions in each State and the number of members for each division, though a division is not to be formed out of parts of different States (s. 29). It may regulate elections to either House (ss. 10, 31); prescribe the qualifications of electors, subject to the provisions of section 41 (ss. 8, 30), and also the qualifications of senators and members of the House of Representatives (ss. 16, 34), though both sets of qualifications must be the same for either House (ss. 8, 16), and in the choosing of senators or of members of the House of Representatives there is to be no plural voting (ss. 8, 30); make provision with respect to the liability of a disqualified person who sits in either House (s. 46); provide for the determination of questions respecting qualifications, vacancies, and disputed elections, as regards either House (s. 47); fix the quorum of either House (ss. 22, 39); determine the allowance to be paid to senators and members of the House of Representatives (s. 48); and declare the powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House (s. 49).

As to the executive government, the Commonwealth Parliament may determine the number of Ministers of State for the Commonwealth and the annual sum to be paid out of the Consolidated Revenue Fund for their salaries, and provide for the appointment and removal of officers of the public service (ss. 65, 66, 67).

The Commonwealth Parliament may determine various matters affecting the High Court, other Federal Courts, and State Courts. It may prescribe the number of Justices of whom, in addition to the Chief Justice and at least two other Justices, the High Court is to consist (s. 71). It may, in a number of cases, exclude appeals to the High Court (s. 73), and in any of the matters mentioned in section 76, including any matter arising under any Federal law, it may confer original jurisdiction on the High Court (s. 76). It may create Federal Courts and define their jurisdiction (s. 71, 77 (i)). In regard to any of the matters mentioned in sections 75 and 76, including any matter in which the Commonwealth is a party, or any matter between States, or any matter arising under any Federal law, it may exclude the jurisdiction of any State Court (s. 77 (ii)), and invest any State Court with federal jurisdiction (s. 77 (iii)). It may, within certain limits, confer rights to proceed against the Commonwealth or a State (s. 78). It may prescribe the number of judges by whom the jurisdiction of any federal Court, or the federal jurisdiction of any State Court, is to be exercised (s. 79). It may provide that any offence against any law of the Commonwealth is to be tried on indictment or otherwise as it thinks proper. If the offence is to be tried on indictment, the trial is to be by jury, and in

the State in which the offence was committed, or if it was not committed within any State, then at such place or places as the Parliament prescribes (s. 80). If the offence is not to be tried on indictment, the Parliament may provide for the mode of trial, *e.g.*, for the offence to be tried summarily by a magistrate.

The powers of the Commonwealth Parliament also extend, though in some instances with important qualifications, to the following:—the appropriation of the Consolidated Revenue Fund (s. 81), the distribution of surplus revenue (s. 94), the grant of financial assistance to the States (s. 96), the powers of adjudication and administration to be conferred on the Inter-State Commission (s. 101), the forbidding of preference or discrimination by a State as to railways (s. 102), the taking over of State debts (s. 105), the making of agreements by the Commonwealth with respect to the public debts of the States, and to Commonwealth and State borrowing (s. 105A), the annulment of the inspection laws of a State (s. 112), the detention in State prisons of persons accused or convicted of offences against the laws of the Commonwealth (s. 120), the admission or establishment of new States (s. 121), the alteration of the limits of a State (s. 123), and the government of Territories (s. 122).

Financial Agreements between the Commonwealth and the States.

Section 105A of the Constitution, which was inserted by *Constitution Alteration (State Debts)* 1928, and under which the Commonwealth may make agreements with the States with respect to the public debts of the States, is important from a constitutional as well as from a financial point of view. An agreement made or validated under the section will confer legislative powers on the Commonwealth, but will at the same time impose limitations on the power of the Commonwealth, and of a State, to make laws derogating from the agreement. Matters in respect of which agreements may be made are enumerated in the first sub-section, and include not only the taking over of State debts but also the borrowing of money by the States, or by the Commonwealth, or by the Commonwealth for the States. An agreement made in accordance with the section, or in the case of an agreement made before the commencement of the section, validated by legislation of the Commonwealth Parliament, is binding on the Commonwealth and the States during the currency of the agreement unless, under the fourth sub-section, it is varied or rescinded with the consent of all the parties. Under the fifth sub-section every such agreement and any such variation is to be binding upon the Commonwealth and the States which are parties thereto, notwithstanding anything contained in the Constitution of the Commonwealth or the Constitution of the several States, or in any law of the Parliament of the Commonwealth or of any State.

The importance of this aspect of the section may be illustrated by comparing an agreement made under the section with the *Surplus Revenue Act* 1910, under which the Commonwealth was to make *per capita* payments to each State for a period of at least ten years from the 1st July, 1910. The powers of the Commonwealth Parliament were not affected by the obligations which that Act imposed on the Commonwealth, and legally the Commonwealth Parliament could have amended or repealed the Act before the period of ten years had expired. The Commonwealth Parliament cannot of its own motion vary or rescind an agreement made under section 105A of the Constitution.

The agreement (*see* Appendix B) which was made on the 12th December, 1927, between the Commonwealth and all the States, the Commonwealth being the party of the first part and New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania being the parties of the second, third, fourth, fifth, sixth and seventh parts respectively, was in the first instance approved by the Parliaments of the Commonwealth and of the States, the approval being given before the bill for *Constitution Alteration (State Debts)* 1928 was submitted to the electors. After the proposed alteration of the Constitution was approved by the requisite majorities, the agreement was validated by the *Financial Agreement Validation Act* 1929.

Once an agreement is made, or once the agreement of the 12th December, 1927, was validated as above, it is not competent for the Commonwealth Parliament or any State Parliament to pass legislation which will affect the binding force of the agreement, unless the legislation is in pursuance of an agreement of all the parties.

Other aspects of section 105A are discussed elsewhere in this report (*see* xix.—The Financial Relations of the Commonwealth and the States; and xxi.—The Alteration of the Constitution).

Exercise of Powers by the Commonwealth Parliament.

The extent to which the legislative power of the Commonwealth has been exercised in relation to any particular provision of the Constitution or to its subject-matter is indicated in the tables which are set out in the annual volume of Commonwealth Acts, and which group the legislation from 1901 onwards under the provisions of the Constitution by virtue of or in relation to which it has been enacted, and show, in the case of those provisions of the Constitution which remain in force "until the Parliament otherwise provides," whether any other provision has been made. The Commonwealth Parliament has exercised a great number of the powers of legislation conferred by the Constitution, including most of the powers conferred by section 51, but it has not legislated with respect to marriage or divorce, except in the *Matrimonial Causes (Expeditionary Forces) Act* 1919, or with respect to weights and measures. Evidence was given in this inquiry of the need of uniformity in the laws relating to marriage and divorce throughout Australia. Evidence was also given of the need for establishing a Bureau of Standards in exercise of the power of legislation with respect to weights and measures.

It was thought at one time that the Commonwealth Parliament had power to pass a uniform Companies Act under section 51(xx), but owing to doubts thrown upon the power of the Commonwealth in the case of *Huddart Parker Company Proprietary Limited* v. *Moorehead* (8 C.L.R., 330) no uniform Companies Act has been passed, and there remain wide differences between the Companies Acts of the several States, some of which it is claimed afford inadequate protection to the public.

The Commonwealth Parliament has exercised the exclusive powers of legislation relating to the seat of government of the Commonwealth, and to those departments of the Public Service the control of which was by the Constitution transferred to the Executive Government of the Commonwealth.

Certain Acts of the Commonwealth Parliament cannot be referred to one head of power only, *e.g.*, the *Customs Act* 1901-1925, some sections of which may be based on the customs power, and some on the provisions in section 51 (i) relating to trade and commerce with other countries. Certain Acts may not be referable to any of the powers enumerated in sections 51 and 52, but may be referable to section 81 of the Constitution, under which the Consolidated Revenue Fund is to be appropriated "for the purposes of the Commonwealth". Certain Acts are referable to the power conferred by section 122 to legislate for the government of the Territories. Numerous enactments, including provisions with respect to offences, penalties, procedure and a variety of other matters, derive support from the incidental powers conferred by section 51 (xxxix).

Regulations.

There is no "separation of powers" in the Constitution which precludes the Commonwealth Parliament from delegating power to make laws. An Act frequently confers a power to make regulations prescribing matters which are necessary or convenient to be prescribed for carrying out or giving effect to the Act. A power to make regulations or ordinances is conferred in Acts passed for the government of the Territories, ordinances being made by a Legislative Council for Papua, and regulations or ordinances being made by the Governor-General for the other Territories. In accordance with the *Acts Interpretation Act* 1901-1918 (s. 10), regulations come into force, unless a contrary intention appears in the Act under which they are made, as soon as they are notified in the *Gazette*, but are to be laid before Parliament and if disallowed in either House by a resolution of which notice has been given within fifteen sitting days, they cease to have effect. Provision is made in the *Rules Publication Act* 1903-1916 for the publication of regulations and other statutory rules. The Act as originally enacted was modelled on an Act passed by the British Parliament in 1893, and had two objects—(*a*) to supply facilities for criticizing the drafts of rules proposed to be made under statutory authority, and (*b*) to provide for the publication of the rules when made, but the sections by which effect was given to the first of these objects were repealed in 1916. The Act applies to rules, regulations or by-laws which (*a*) relate to any Court within the Commonwealth, or (*b*) are made by the Governor-General, or any Minister, or the Inter-State Commission, or any Government department. The statutory rules of each year are published annually in volumes similar to the volumes of statutes, together with a table of the rules made prior to and in force at the end of the year, arranged under the Departments by which they are administered.

Attention was drawn by several witnesses to the extent and importance of the subordinate legislation enacted under delegated powers (evidence, pp. 878, 938, 952, 1170). An increase in the practice of delegating legislative powers to executive authorities is to be found in many Parliaments in recent times, but it is generally recognized, in British countries at least, that a line can and should be drawn between matters which ought to be dealt with by Parliament itself, and matters which may be left to departmental regulation, though on the question where that line should be drawn in a particular case there may be much difference of opinion (*cf.* Ilbert, *Legislative Methods and*

Forms, pp. 36-42, 218). It was urged in evidence before the Commission that the delegated powers are not restricted to the provision of administrative machinery, but affect the liberties of the people and tend to become bureaucratic, and it was suggested that the procedure of the English *Rules Publication Act* 1893 should be followed, that is, in effect, the procedure which was adopted by the Commonwealth Parliament in 1903 and discarded in 1916. Under that procedure, in the cases referred to in the Act, notice of the proposal to make the regulations and of the place where copies of the draft regulations might be obtained would be published in the *Gazette* at least 60 days before the regulations were made, though in cases of urgency provisional regulations might be made and might continue in force until regulations of a permanent character were made after notice (evidence, p. 1170).

Entry upon fields of legislation not expressly assigned to the Commonwealth Parliament.

In the exercise of its powers the Commonwealth Parliament has been able to enter upon fields of legislation which were not expressly assigned to it by the Constitution.

(1) By virtue of its control of posts, telegraphs and telephones the Commonwealth Parliament has legislated so as to prevent letters being delivered to the addresses of persons engaged in carrying on a lottery, although it has no specific power to legislate with respect to lotteries.

(2) By virtue of its power to legislate with respect to taxation the Commonwealth Parliament has been able to pass an Act intended to bring about the subdivision of large estates.

(3) By virtue of its control over elections the Commonwealth Parliament has enacted that while elections are pending for the Commonwealth Parliament, newspaper articles and other matter commenting on election issues shall be signed (*see Smith* v. *Oldham*, 15 C.L.R., 355). This enactment has now been modified with regard to leading articles and reports of meetings.

(4) The Commonwealth has no express power to control conditions of manufacture, but by virtue of its power to legislate with respect to trade and commerce with other countries it claims the right to prohibit the export of goods which are not manufactured under approved conditions.

(5) The Commonwealth may admit goods on condition that they are to be used in a manner prescribed by the Comptroller-General of Customs, and this condition may be enforced by a bond.

(6) The Commonwealth has no power to legislate with respect to industrial conditions, but by virtue of its power to legislate with respect to conciliation and arbitration, it has set up a Court which may in part override State laws and fix standard wages and hours.

(7) The Commonwealth may impose conditions on loans made to States and so influence State administration. Loans have been made to the State of South Australia, for forestry purposes, subject to conditions, and an officer of the Forestry School has been sent to Tasmania to inquire into proposals for a loan, also subject to conditions other than conditions for repayment.

(8) The Commonwealth may influence the method of administration of the States by making grants, subject to conditions as to the manner in which the money granted shall be expended. The most conspicuous instance is the roads' grant, which is made subject to the condition that the money granted will be spent on a prescribed type of road, that the States will contribute a prescribed proportion of the total sum spent, and that preference will be given to contract labour.

IX.—THE HIGH COURT AND THE JUDICIAL POWER OF THE COMMONWEALTH.

The functions of the High Court may be stated under three heads. It is an interpreter of the Constitution of the Commonwealth, it is a court of appeal from the courts of the States, and it is a court of original jurisdiction.

In exercising its function of an interpreter of the Constitution the High Court of Australia has the duty of deciding the validity of any Federal Act or any State Act whenever the question of validity comes before it in properly constituted litigation. The High Court alone can finally determine in Australia the extent of the powers transferred to the Commonwealth and the extent of those remaining with the State, and the meaning of the terms used in the Federal Constitution. In this respect it exercises a power similar to that exercised by the Supreme Court of Canada, but in one respect it occupies a position different from that of any other court in the Dominions. No appeal from the High Court is permitted to the King in Council upon any decision howsoever arising as to the limits *inter se* of the constitutional powers of the Commonwealth and of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by His Majesty in Council (s. 74). The royal prerogative has therefore been curtailed in order to establish the High Court as the sole interpreter of the Constitution.

The restriction imposed by section 74 does not apply to appeals from State Courts. The Constitution of itself does not prevent a litigant from appealing direct from a State Court to the Privy Council. The Commonwealth Parliament has therefore exercised its powers under sections 76 and 77, in order to ensure that, whenever a question may arise involving the rights *inter se* of the States and the Commonwealth, no appeal shall be made to the Privy Council until the matter has first come before the High Court. This result has been reached through the *Judiciary Act* 1903, as subsequently amended by the *Judiciary Act* 1907. By the *Judiciary Act* 1903-1907, section 30, Parliament invested the High Court with original jurisdiction in all matters arising under the Constitution or involving its interpretation. Section 39 of the same Act provides that:—

(1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of either of the last two preceding sections, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.

(2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in the last preceding section, and subject to the following conditions and restrictions:—

(*a*) Every decision of the Supreme Court of a State, or any other court of a State from which at the

establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court.

(*b*) Wherever an appeal lies from a decision of any Court or Judge of a State to the Supreme Court of the State, an appeal from the decision may be brought to the High Court.

(*c*) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State, notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

(*d*) The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised, except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction.

Section 40 (1) of the *Judiciary Act* 1903-1907 provides that any cause arising under the Constitution or involving its interpretation which is pending in any Court of a State may at any stage of the proceedings be removed into the High Court under an order of the High Court. The object which these sections were intended to bring about was facilitated by sections 38A and 40A, which were added by the amending Act of 1907. Section 38A provides that in matters (other than trials of indictable offences) involving any question however arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the States, so that the Supreme Courts of a State shall not have jurisdiction to determine any such matter. Section 40A provides that when in any cause pending in the Supreme Court of a State there arises any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, it shall be the duty of the Court to proceed no further in the cause, and the cause is automatically and without order of the High Court removed to the High Court.

Subsequently to the enactment of sections 30 and 39 of the *Judiciary Act* 1903, an appeal was taken direct to the Privy Council in a question concerning the limits *inter se* of the powers of the Commonwealth and the State of Victoria (*Webb* v. *Outtrim*, 1907, A.C. 81), and the Privy Council appears to have expressed the opinion that the enactment of section 39 (2) was beyond the powers of the Commonwealth Parliament, but according to the judgment of a majority of the High Court in the *Commonwealth* v. *Limerick Steamship Company* (35 C.L.R., 69) the Privy Council in expressing this opinion did not direct its attention to a court of federal jurisdiction.

When application has been made to the High Court for a certificate under section 74, the application has been refused on all occasions but one. On that occasion the Court was equally divided, and the opinion of the Chief Justice prevailed. In granting the certificate the Chief Justice stated that one reason for so doing was that the decision of a Court which is equally divided would not have the weight which a decision of the High Court ought to have. In a number of other cases a certificate has been refused, notwithstanding that the question at issue was of great importance (*Municipal Council of Sydney* v. *The Commonwealth,* 1 C.L.R. 208, at 237; *Deakin* v. *Webb,* 1 C.L.R. 585; *Engineers' Case* 29 C.L.R. 406; *Nelson* v. *Couch,* [1929] 35 *Argus* L.R. 177), and when the Privy Council had laid down a rule of interpretation with which the High Court did not agree, the High Court refused to follow the Privy Council, claiming that to treat a decision of the Privy Council as over-ruling its own decision on a question which it thought ought not to be determined by the Privy Council would be to substitute the opinion of that body for itself, and would be an unworthy abandonment of the great trust reposed in it by the Constitution.

In cases other than *Webb* v. *Outtrim,* the Privy Council itself has refused to adjudicate on questions which in its opinion came within the language of section 74 (*Attorney-General for New South Wales* v. *Collector of Customs,* 5 C.L.R. 818; *Builders' Labourers' Case,* 24 C.L.R. 296; *Engineers' Case,* 1923 A.C. 170).

The manner in which the High Court has been constituted the final interpreter of the Constitution through the Judiciary Act was stated by Mr. Justice Isaacs (Sir Isaac Isaacs) in *Baxter* v. *Commissioners of Taxation* (4 C.L.R. 1087, at pp. 1142-1143, 1148-1149) :—

> "Sec. 77 (ii) of the Constitution confers power on the Parliament with respect to matters involving constitutional interpretation to make laws defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States. Sec. 39 of the Judiciary Act begins with the exercise of that power. By the first sub-section the jurisdiction of the High Court is made exclusive of that of the State Courts, except such as is found later on in the section. This it will be observed is not a conditional exercise of power, it is absolute; the exclusion of the jurisdiction of other Courts is complete and unqualified unless a valid exception is to be found later on. The subsequent portion of the section by virtue of sec. 77 (iii) invests the State Courts with 'federal jurisdiction'.
>
> It appears necessary at this point to guard against an error which may easily arise. 'Jurisdiction' is a generic term and signifies in this connexion, authority to adjudicate. State jurisdiction is the authority which State Courts possess to adjudicate under the State Constitution and laws; federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws.
>
> The first is that which 'belongs to' the State Courts within the meaning of sec. 77; the latter must be 'vested in' them by Parliament. Now sec. 77 (ii) is a power to exclude jurisdiction, and this power has been exerted in this first sub-section of sec. 39, the result being that, so long as that provision stands unrepealed, no State jurisdiction can exist. Sec. 77 (iii), on the other hand,

is a power to invest with federal jurisdiction, not to restore State jurisdiction, and an exercise of that power in sub-sec. (2) of sec. 39 of the Judiciary Act is no contradiction of the deprivation contained in the prior sub-section, and works no restoration of the State jurisdiction. It is, therefore, clearly an error to say that the Federal Parliament has in the same section purported to take away and to return the same jurisdiction, with or without the power of appeal to the Privy Council, or that the conjoint effect of sub-secs. (1) and (2) of sec. 39 of the Judiciary Act is to leave the jurisdiction of the State Courts as it previously stood. They still have jurisdiction in respect of the same subject-matters, but their authority to exercise judicial power with regard to those matters springs from another source quite as much as if an Imperial Act had enacted by one section that their State jurisdiction should cease, and by the next section that henceforth they should have similar jurisdiction but should exercise it under the authority of that statute. The authority which is given by sec. 39—namely federal jurisdiction—had never been taken away, because it had never 'belonged to' a State Court; that which was taken away—namely State jurisdiction—has never even nominally been returned. Sec. 39 (2) confers 'federal jurisdiction' only; none other is in the power of the Commonwealth Parliament to grant, and in the result either the State Courts possess federal jurisdiction only in these matters or they possess none at all. . . .

If the history of the section were to be called in aid, as was done by the Privy Council itself, in *Webb* v. *Outtrim* [(1907) A.C. 81], the conclusion is strengthened. For the present purpose I think the words themselves, by their inherent force, are clear enough and strong enough to satisfy the mind as to the duty of the Court when such a question as the present is submitted to it. Sec. 74 finds no parallel in British legislation. It selects a certain class of controversies and places them apart from all others as proper for separate and unprecedented judicial treatment.

They are selected, not because they are trifling or frivolous or of a limited effect or passing interest, but by reason of their inherent magnitude, and because they are of the highest concern, on the one side to the development of Australian nationhood, and on the other to the preservation of the States. Their influence is permanent and far reaching, not confined to the immediate litigants nor to a special class in the community, nor even to a State, but extends so far as to affect the political relations of the whole people, when considered in conflicting groups, as citizens of different States, or as citizens of both States and Commonwealth. The determination of these questions touches the very root of the federal principle, namely, the distribution as between State and State, and Commonwealth and State, of that total mass of governmental power, which the Imperial Parliament has granted, and over which, outside the reservations to be found in the Constitution itself, the Imperial authority does not assume or exercise control.

All these questions when pronounced upon by the Supreme federal tribunal constituted and sitting in Australia are declared by sec. 74 to be free from the intervention of even the Royal prerogative. Unless and until the High Court certifies that a

question, determined by it and included within the terms of the section, ought to be decided by the Privy Council, which, however eminent, is nevertheless a tribunal constituted and sitting outside Australia, the Constitution insists that it ought not to be and must not be so decided, and until that event occurs—if it ever should occur—the supreme law of the Empire knows no judicial authority in relation to that question superior to this Court."

The High Court has a function of singular importance in seeing that neither the Commonwealth nor the States infringe the compact which is embodied in the Federal Constitution. This function of the High Court has given rise to criticism of the nature of the Federation and of the check which the authority of the Court places on the will of a majority in Parliament.

Further, the reversal of its own decisions by the High Court, and the number of differing opinions expressed by the Justices, have given rise to difficulty and uncertainty in legislation, and have aroused further criticism of the place occupied by the Court in a federal system. In exercising the right of reversing its own decisions the High Court is in accord with the Supreme Court of the United States and with the Privy Council. The High Court will not decide a constitutional question unless the Court consists of at least six Justices, and at least three Justices concur in the decision. In constitutional cases, if the Justices are equally divided, the case is determined by the opinion of the Chief Justice; in other cases the decision of the Court from which the appeal is brought prevails. The High Court in deciding on the validity of Acts of the Commonwealth or State Parliaments in properly constituted litigation discharges the same function as is discharged by any Court which inquires into the source of the authority for any rule or by-law brought before it.

The position of the High Court in a federal system may be illustrated by the following passage from the judgment of Chief Justice Marshall, of the Supreme Court of the United States, in the case of *Marbury* v. *Madison* (1 Cranch, 137, at pp. 176-178) :—

"The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation; and consequently the theory of every such government must be that an act of the legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this

court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject. If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case; this is of the very essence of judicial duty. If then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the expressed prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers, within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

The position of the High Court may also be illustrated by the following passage from the judgment of Sir Samuel Griffith, *C.J.*, in the case of *Baxter* v. *Commissioners of Taxation* (4 C.L.R., 1087, at p. 1125) :—

"The observation that the American Union has erected a tribunal which possesses jurisdiction to annul a Statute on the ground that it is unconstitutional seems to be founded on the supposition that the Supreme Court of the United States was endowed with special powers in this respect different from those possessed by other Courts. We have already pointed out that that tribunal was created by a provision in the American Constitution identical with that by which the High Court is created. The power of the Supreme Court of the United States to decide whether an Act of Congress or of a State is in conformity with the Constitution depends upon and follows from the Constitution itself, which is, by section 2 of Article VI., declared to be the supreme law of the land, as the Australian Constitution is declared

to be by section 5 of the Constitution Act. Such questions must certainly arise under a federal Constitution, and must be determined by the Courts before which they are raised. Their Lordships [*i.e.*, in the judgment of the Privy Council in *Webb* v. *Outtrim*, 1907 A.C. 81] seem to have thought that this Court had asserted a power to declare a law invalid on the ground that it is 'unconstitutional', using that word in some vague general sense, but meaning something different from a contravention of the written Constitution. This Court, of course, never asserted any such power, nor did it ever occur to it to treat the word 'unconstitutional', as used in the American Courts, as meaning anything more than contrary to and forbidden by the Constitution, nor have those Courts ever claimed to do anything more than construe the written Constitution by the light of recognized canons. English jurisprudence has always recognized that the Acts of a legislature of limited jurisdiction (whether the limits be as to territory or subject-matter) may be examined by any tribunal before whom the point is properly raised. The term 'unconstitutional', used in this connexion, means no more than *ultra vires*."

Original Jurisdiction.

The original jurisdiction of the High Court is based on sections 75, 76, and 77 of the Constitution as applied in the relevant sections of the *Judiciary Act* 1903-1927.

Section 75 of the Constitution enacts that in all the matters therein mentioned the High Court shall have original jurisdiction. That jurisdiction is not, merely by force of section 75, exclusive of the jurisdiction of the State Courts. The Commonwealth has, therefore, in exercise of the powers conferred on it by section 76 (ii) of the Constitution enacted, by section 38 of the *Judiciary Act* 1903-1927, that the jurisdiction of the High Court shall be exclusive of the jurisdiction of the State Courts in the following matters:—(*a*) matters arising directly under any treaty; (*b*) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State; (*c*) suits by the Commonwealth or any person suing on behalf of the Commonwealth against a State or any person being sued on behalf of a State; (*d*) suits by a State or any person suing on behalf of a State against the Commonwealth or any person being sued on behalf of the Commonwealth; (*e*) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a Federal Court.

Section 76 of the Constitution provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under the Constitution or involving its interpretation, and the Parliament as already mentioned has exercised this power by section 30 of the Judiciary Act. Section 76 further provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under any laws made by Parliament, and in any matter of Admiralty and maritime jurisdiction. By section 2 of the *Judiciary Act* 1914 the Parliament conferred original jurisdiction on the High Court in matters of Admiralty or maritime jurisdiction, and by section 3 of that Act has declared the High Court to be a Colonial Court of Admiralty within the meaning of the *Colonial Courts of Admiralty Act*, 1890.

The power in section 76 (ii) to confer original jurisdiction in any matter arising under any laws made by the Parliament has not been completely exercised. The High Court has not original jurisdiction in matters relating to trade-marks, patents, bills of exchange, and certain other matters arising under laws made by Parliament, but by section 2 of the *Judiciary Act* 1915 Parliament has enacted that the High Court shall have original jurisdiction in trials of indictable offences against the laws of the Commonwealth. A Commonwealth Crimes Act was assented to on the 29th October, 1914, and by that Act certain offences against the Government and against laws of the Commonwealth were made indictable offences.

Suits by and against the Commonwealth and the States.

The Commonwealth Parliament is empowered by section 78 of the Constitution to make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power (*see Commonwealth* v. *New South Wales,* 32 C.L.R. 200). In Part IX. of the *Judiciary Act* 1903-1927 the Parliament has made provision with respect to suits by and against the Commonwealth and the States, and has enacted in regard to claims in contract or in tort (*a*) that a suit by any person against the Commonwealth may be brought in the High Court or in the Supreme Court of the State in which the claim arose; (*b*) that a suit by any State against the Commonwealth may be brought in the High Court; and (*c*) that a suit by any person against a State, in respect of a matter in which the High Court has original jurisdiction or can have original jurisdiction conferred on it, may be brought in the Supreme Court of the State, or if the High Court has original jurisdiction in the matter, in the High Court (ss. 56-58). Under section 59 of that Act any State making any claim against another State may bring a suit against that State in the High Court.

Difficulties arising from the provisions of the Constitution and the Judiciary Act with respect to the original jurisdiction of the High Court.

The provisions of the Constitution and of the *Judiciary Act* 1903-1927 relating to the original jurisdiction of the High Court have produced a number of anomalies and difficulties in the administration of justice.

(1) If an action is brought against a State the relief obtainable may depend on whether the plaintiff is or is not a resident of the State sued. If he is a resident of the State sued, he will not be able to sue in tort, if the laws of the State, like the laws of the State of Victoria, permit only of the State being sued in contract. If he is a resident of another State, he may sue either in tort or in contract without the consent of the State sued (*Commonwealth* v. *New South Wales,* 32 C.L.R. 200).

An individual may sue another individual in the High Court if the individuals are residents of different States, but the High Court has no jurisdiction if one of the parties is a company (*Australian Temperance and General Mutual Life Assurance Society* v. *Howe,* 31 C.L.R. 290).

Doubts have arisen whether the High Court has original jurisdiction in a suit in which the parties, though residents of different States, are rival claimants in the distribution of a fund or of an estate.

(2) The more serious difficulties have arisen, or may arise, through the provisions of the Judiciary Act conferring original jurisdiction on the High Court, and federal jurisdiction on State courts which have been deprived of State jurisdiction. These provisions, or some of them, were designed to render it necessary that all matters in which the interpretation of the Constitution is involved shall come before the High Court. This object has been achieved, but at the same time the position of litigants has been made difficult and uncertain.

(i) A plaintiff when he begins litigation in the Supreme Court of a State may not know whether a constitutional question will be involved. The jurisdiction will, therefore, depend, not on the subject-matter of the litigation, but on the nature of the defence raised. If the defence involves an "*inter se*" constitutional question (*see* s. 74 of the Constitution), then the matter is immediately taken from the Supreme Court to the High Court, with consequent delay and expense.

(ii) A plaintiff may not know whether his opponent is a resident of a different State or not. If it turns out that the plaintiff and defendant are residents of different States, then the proceedings may be found to be abortive if brought before an inferior tribunal owing to the tribunal not being constituted in the manner prescribed by section 39 (2) of the Judiciary Act.

Examples of these anomalies and difficulties as well as of anomalies and difficulties arising from provisions of the Constitution and of the Judiciary Act relating to other aspects of the judicial power of the Commonwealth are given in the passages of the evidence of Mr. Owen Dixon (now Mr. Justice Dixon) and of Mr. J. E. Clark (pp. 783-789, 1219) which are quoted later in this section of the report.

The High Court as a Court of Appeal from the State Courts.

An appeal lies to the High Court, subject to such regulations as the Commonwealth Parliament prescribes, from all judgments, decrees, orders, and sentences of the Supreme Court of any State in any matter in which at the establishment of the Commonwealth an appeal lay to the Queen in Council. From the High Court an appeal lies, in cases other than those mentioned in section 74, to the Privy Council by special leave of the Privy Council. The Parliament may make laws limiting the matters in which the leave may be asked, but the laws must be reserved for the royal assent, and so far no such laws have been passed.

An appeal lies in cases other than constitutional cases from the Supreme Courts of the States to the Privy Council on conditions prescribed by orders in Council. A defeated litigant has, therefore, the right to choose whether he will appeal to the High Court or to the Privy Council, and a successful litigant is bound by his choice. This right of choice is freely exercised by litigants.

The manner in which the right of appeal from a State Court to the High Court may be exercised is prescribed by the *Judiciary Act* 1903-1927 (s. 35):—

"(1) The appellate jurisdiction of the High Court with respect to judgments of the Supreme Court of a State, or of any other

Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall extend to the following judgments whether given or pronounced in the exercise of federal jurisdiction or otherwise and to no others, namely:

(*a*) Every judgment, whether final or interlocutory, which—

(1) is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of Three hundred pounds; or

(2) involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of Three hundred pounds; or

(3) affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency;

but so that an appeal may not be brought from an interlocutory judgment except by leave of the Supreme Court or the High Court;

(*b*) Any judgment, whether final or interlocutory, and whether in a civil or criminal matter, with respect to which the High Court thinks fit to give special leave to appeal;

(*c*) Any judgment of the Supreme Court of a State given or pronounced in the exercise of federal jurisdiction in a matter pending in the High Court."

A litigant cannot be deprived of the right of appeal to the High Court in any matter in which at the establishment of the Commonwealth an appeal lay to the Privy Council, either by the Commonwealth Parliament, or by a State Parliament (*Parkin* v. *James,* 2 C.L.R. 315; *Peterswald* v. *Bartley,* 1 C.L.R. 497).

An appeal will not lie to the High Court from the verdict of a jury (*Musgrave* v. *McDonald,* 3 C.L.R. 132), but it will lie from the decision of a single judge exercising the jurisdiction of the Supreme Court (*Parkin* v. *James,* 2 C.L.R. p. 315; *Blake* v. *Bayne,* 1908 A.C. 371, 374; *Saunders* v. *Borthistle,* 1 C.L.R. 379).

The right of the High Court to allow appeals to be brought to it from the Supreme Court of a State has in practice received a wide interpretation. The High Court will hear an appeal from a decision of a State Court granting a writ of *habeas corpus* (*ex parte Ah Sheung,* 4 C.L.R. 949; *Lloyd* v. *Wallach,* 20 C.L.R. 299), but has decided that it will not hear an appeal from a verdict of acquittal (*R.* v. *Snow,* 20 C.L.R. 315).

The Judicial Power.

The judicial power of the Commonwealth is vested in a Federal Supreme Court called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other Courts as it invests with federal jurisdiction (s. 71).

The Justices of the High Court and of the other Courts created by the Commonwealth Parliament are appointed by the Governor-General in Council, and are not to be removed except on an address from both Houses of Parliament praying for their removal on the ground of proved misbehaviour or incapacity (s. 72).

It follows from the provisions of section 71 that the judicial power of the Commonwealth may not be exercised by any tribunal other than those mentioned, and that, therefore, the Inter-State Commission could not exercise that judicial power (*New South Wales* v. *Commonwealth*, 20 C.L.R. 54).

It also follows that the High Court cannot give opinions or decisions except in litigation instituted between parties. The High Court will, therefore, refuse to hear and determine a question referred to it by the Governor-General, as to the validity of an enactment of the Commonwealth Parliament, and Part XII., which was inserted in the Judiciary Act by an amending Act of 1910, and which purported to give it this power is invalid (*In re Judiciary Act and the Navigation Act*, 29 C.L.R. 257.)

It was suggested that though the giving of advisory opinions by the High Court might prevent the establishment of expensive departments to administer Acts which are afterwards declared invalid, yet the inconvenience occasioned by the decision already quoted had been mitigated by the practice of suits being instituted by the Attorney-General of the Commonwealth or of a State, with the object of testing the validity of an Act of Parliament.

Owing to the requirements of section 72 as interpreted, the Judges of the High Court and of any Court created by the Commonwealth Parliament must be appointed for life. Questions have arisen as to the powers of tribunals appointed by the Commonwealth Parliament for a limited term, and in particular, whether the powers of these tribunals are administrative or judicial. It is clear that certain officials and tribunals have powers which affect rights but are not judicial, such for instance as the Attorney-General, under the *Patents Act* 1903-1921, and the Minister for Customs, or the Comptroller-General of Customs, under the *Customs Act* 1901-1925, and it has been decided that certain other tribunals were not entitled to exercise the powers which Parliament had conferred on them. Thus, while the President of the Court of Conciliation and Arbitration was appointed for a limited term, he could not exercise the powers of a court and enforce penalties (*Waterside Workers' Federation* v. *J. W. Alexander*, 25 C.L.R., 434), though since the *Commonwealth Conciliation and Arbitration Act* 1926, which provided for the appointment of a Chief Judge and other Judges of the Court on a tenure in accordance with section 72 of the Constitution, the Court can exercise judicial power as a federal Court created by the Commonwealth Parliament under section 71 of the Constitution. The purported establishment of an income-tax board of appeal, the members of which were appointed for a limited term to exercise judicial functions was a nullity (*British Imperial Oil Co.* v. *Federal Commissioner*, 35 C.L.R. 422). It also follows from the terms of section 72 that no retiring age for the Justices can be fixed.

The terms of sections 71 and 72 do not apply to Territories so that an appeal will lie to the High Court from the decision of a Judge of a Territory, including a mandated Territory, appointed for a limited term.

The requirements of these sections do not apply to judges or magistrates of State Courts invested with federal jurisdiction.

The operation of sections 71 to 77 of the Constitution, and of the Judiciary Act 1903-1927.

Examples of the anomalies and difficulties which have arisen, or may arise, from the operation of sections 71 to 77 of the Constitution, and of the *Judiciary Act* 1903-1927, will be found in the evidence of Mr. Owen Dixon (now Mr. Justice Dixon) given on behalf of the Committee of Counsel of Victoria, and of Mr. J. E. Clark, Assistant Crown Solicitor of New South Wales.

The following extracts are taken from the evidence of Mr. Owen Dixon (pp. 783-789) :—

"Unfortunately, in selecting the matters to be allotted to the original jurisdiction of the High Court, not a few were made to depend upon the character of the controversy arising in the litigation. In section 75, jurisdiction is given in all matters arising under any treaty, and, in section 76, it may be given in all matters 'arising under this Constitution or involving its interpretation,' or 'arising under any laws made by the Parliament.' It seems unfortunate that the jurisdiction to entertain a legal proceeding in which the party originating it desires to enforce rights which he believes he possesses should depend upon the character of the questions which arise when the matter comes to be heard. Moreover, it is extremely difficult to say whether, when a party complains of wrongs, the elucidation of some of which involve the interpretation of the Constitution and some of which do not, how much of the proceeding is a matter over which the High Court has jurisdiction. If sections 75 and 76 were considered merely as provisions conferring jurisdiction, they would seem to us to be open to the most serious practical objection, because a jurisdiction given to a court for the enforcement of the law is made to depend upon the most controversial matters, which must be determined before ever the merits of the case are reached. These provisions in truth sacrifice the interests of the litigant to the desire of the framers of the Constitution to preserve to the High Court the power of giving constitutional rulings and making constitutional precedents. When these provisions are considered in relation to section 77 and the use which has been made of that section, it will be seen that the greatest difficulty and confusion have arisen, and an incredible burden has been placed upon the litigant who has the misfortune to be affected in his litigation by any Federal law or any other matter with which sections 75 and 76 of the Constitution are concerned.

We think that, generally speaking, it might have been wiser if, when it was decided to bestow upon the High Court the functions of a final court of appeal, it had been thought this was enough to enable that court to maintain full control of the interpretation of the Constitution and the administration of the Federal law in common with that of all other law. We realize that, on occasions, a prompt solution of constitutional controversies has been possible because of the power to bring them immediately before the High Court in its original jurisdiction; but we think that this might be preserved without adhering to the very complicated and difficult criteria of jurisdiction which at present prevail. Some of the difficulties of administering the provision which has enabled Parliament

to confer original jurisdiction upon the High Court in all matters arising under this Constitution or involving its interpretation will appear from three instances which follow, viz.:—

(1) In the cases which arose over the liability of Federal public servants to State income tax calculated upon their salaries, the controversy reduced to its elements was this: The State Commissioner of Taxation, relying upon an ordinary general State statute, proceeded to assess the Commonwealth servants to State tax, and to endeavour to recover it. The taxpayers answered by saying: "Upon the true interpretation of the Constitution, it is not competent for the State statute to extend to the taxation of our salaries." The Commissioner's claim was, therefore, founded upon a State law, and the taxpayers' answer was founded upon the Commonwealth Constitution. It was entirely within the taxpayers own election to raise or not to raise this answer. The question suggested is whether a proceeding in which this answer was in fact raised was a matter of Federal jurisdiction because it was a matter arising under this Constitution or involving its interpretation. Upon that question most divergent opinions have been expressed by the most competent authorities. The Privy Council, in *Webb* v. *Outtrim*, 1907 A.C., p. 81, seems to have thought that the character of the defence brought the matter into Federal jurisdiction. Starke, *J.*, seems to have thought that the character of the claim, viz., upon a State statute to recover in a State tribunal a State tax, made it State jurisdiction, although an unfounded defence depending upon the Constitution was put forward (*Commonwealth* v. *Limerick Steamship Company*, 35 C.L.R., 117); and Irvine, *C.J.*, and Mann, *J.*, in *Kreglinger* v. *Commonwealth*, 1926, V.L.R., 326, consider that because the question whether the defence depending upon the Constitution was or was not unfounded was the question in the case, it necessarily was a matter involving the interpretation of the Constitution.

(2) Again, take James' case (1927, *Argus* L.R., 334). A State legislature enacts that no dried fruits shall be sold in the State for consumption within the Commonwealth beyond a proportion to be declared by a State authority, and further enacts that a State authority may compulsorily acquire parcels of dried fruit if it chooses to do so. The producer of dried fruit desires to contest the exercise of these powers, on the ground that it involves a violation of section 92 of the Constitution. He brings his action. It then appears that the operation of the State Act of Parliament has expired, although the State authority mistakenly acted under it as if it continued. The result is that, upon all matters in relation to his supposed grievances since the date of the expiration of the Act of Parliament, no Federal question arises, although the expiration of the State Act made it clear that none of the powers, the *de facto* exercise of which he complained, were at that time exercisable *de jure*. It follows that the High Court had no jurisdiction to entertain his suit, so far as it related to grievances occurring after that date. It further appeared that, upon the proper construction of the State Act of Parliament, some of his transactions might be outside it. If this were so, although it would be clear that these transactions were not affected by the State Act of Parliament, still

as no question in that respect arose under the Constitution or involved its interpretation, the High Court had no jurisdiction to entertain what, on this assumption, would be a perfectly valid complaint.

(3) The Parliament has not conferred upon the High Court a jurisdiction to entertain all matters arising under any laws made by the Parliament. If it be supposed that a person believing himself to have rights under a Federal law desires to litigate in the High Court, he may do so, if he is confident that his adversary will challenge its validity. If he does not know whether his adversary will do so or not, he must either take the risk, or he must sue in the court of the State. As matters stand, if he sues in the High Court, and his adversary desires to delay him, he may do so by simply refusing to raise any constitutional question, although perhaps, one may be open in the proceedings. If, on the other hand, he sues in the State Supreme Court, his adversary may further delay him by insisting upon raising the constitutional question, because, by reason of the sections 38A and 40A in the Judiciary Act, as soon as he raises it, the jurisdiction of the Supreme Court ceases. However effectual such provisions may be for ensuring that the High Court retains an almost exclusive authority to declare the meaning and effect of the Constitution, no one can fail to see that this is done at the expense of rendering almost futile and impossible the practical administration of justice for the purpose of adjusting the real controversies between subject and subject, or redressing real grievances which a subject may have against the Crown.

Still further difficulties have arisen under heads of jurisdiction which less frequently arise. Parliament may confer, and has conferred original jurisdiction on the High Court in any matter of Admiralty and maritime jurisdiction. *See* section 76 (iii). Admiralty jurisdiction is a well-known expression, but no one seems to know what maritime jurisdiction is. *John Sharp and Sons* v. *s.s. Katherine Mackall* (34 C.L.R., 420).

An incidental result of the Commonwealth's attempt to confer full jurisdiction upon the High Court has been to create doubts in relation to the jurisdiction of the Supreme Courts of the States. The full content of the jurisdiction was supported by means of the Imperial *Colonial Courts of Admiralty Act,* 1890. A consideration of the Colonial Courts of Admiralty Act with the Imperial Acts Interpretation Act will show that it is not at all improbable that the High Court of Australia and the Supreme Courts of the State cannot both at the same time answer the description upon which, in the absence of legislative declaration, the jurisdiction depends, viz., the courts of law in a British possession of original unlimited civil jurisdiction. Whether the State courts have admiralty jurisdiction or not has thus become uncertain, although they have exercised it up till that time, and without question, until the problem arose whether the High Court possessed the extension of admiralty jurisdiction which might or might not come within the words maritime jurisdiction, but which certainly came under the Colonial Courts of Admiralty Act.

Section 75 gives the High Court jurisdiction in all matters arising under any treaty. More controversies in relation to the provision of treaties have arisen during the last seven years as a result of the various peace treaties than perhaps are likely to arise again, but no one yet knows what is meant by the expression 'matter arising under a treaty.' The word 'matter' refers to some claim the subject of litigation. It must, therefore, be a claim of legal right, privilege, or immunity. Under a British system, the executive cannot, by making a treaty, regulate the rights of its subjects. A state of war may be ended or commenced and the rights and duties of persons may be affected by the change from one State or another; but this results from the general law relating to peace and war, and not from the terms of the treaty. If a treaty is adopted by the legislature and its terms are converted into a statute, it is the statute and not the treaty which affects the rights and duties of the persons.

Section 75 (ii) speaks of all matters affecting consuls or other representatives of other countries. When does a matter affect a consul? He may be prosecuted in the police court for failing to register his dog; he may be sued for money borrowed. He may, and often does, conduct an independent business as well as exercise the office of consul. Do all proceedings arising out of the business affect him so that in all his legal relations he is the subject of Federal jurisdiction? If he is an employer, and is the party to an industrial dispute, and is summoned to a compulsory conference in the Arbitration Court, does this raise a question under 75 (ii)? Why should a State court be any the less fit to entertain litigation affecting him than it was when it was a court of a colony?

Section 75 (iii) and 75 (iv) have raised difficulties of a strange character. At first sight, it would seem that they merely operated to give the Federal court jurisdiction, i.e., power to decide upon legal rights otherwise existing and enforceable in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth was a party, and in all matters between States and perhaps between a State and a resident of another State. But a matter in order to be litigated must exist before the litigation is commenced, and, inasmuch as the matter is a legal controversy, it must, as we have said, consist of some claim to a legal right, privilege or immunity. It might have been thought that the existence or non-existence of this right, privilege or immunity, depending as it would be on the general law, was under the full control of the legislature, Commonwealth or State, as the case might be. Indeed, if it were not for the decision of the majority of the High Court in *Commonwealth* v. *New South Wales* (1923, 32 C.L.R., 200), we should unhesitatingly have said that the Federal Parliament had complete authority in respect of every cause of action against the Commonwealth, and every remedy by which it could be enforced. It seems clear to us that the rights of the subject to recover in tort against the Crown in right of the Commonwealth and the proceedings by which recovery may be had are alike the creature of the law which the Federal Parliament controls. But in the case cited, the majority of the High Court decided that section 75 (iii) of the Constitution, in conferring

upon that court original jurisdiction in all matters in which the Commonwealth is a party, enabled the Commonwealth to sue a State in tort without the aid of legislation under section 78, which in their view applied not to section 75, but to section 76. They based their decision upon the ground that the Constitution, by this section in the Constitution binding State and Commonwealth alike, provided means for enforcing a delictual liability against the Crown in either right. This they thought followed from the fact that the word 'matters' includes actions of tort, and, upon the reasoning of *Farnell* v. *Bowman* (12 A.C., 643), the creation of a jurisdiction to entertain such actions sufficed to impose upon the Crown an effective liability for tort.

The judgment must be read at length to appreciate justly the effect of the reasoning which we have attempted to reduce to compendious statement. Logically, it appears to us to imply, if not to state, that it is a provision in the Constitution which imposes upon the Commonwealth liability for tort enforceable in the High Court. If so, how can the Parliament alter, impair or indeed define, this liability? The decision is susceptible of distinguishment upon the grounds—(1) that the case was before the High Court upon motion to set aside the writ for want of jurisdiction, and therefore no question of substantive liability was raised; (2) that the State of New South Wales had, by legislation, abandoned the Crown's delictual immunity, although subject to and under special procedure.

Apart from the question of legislation, the interpretation of section 75 (iv) produces a strange result in Victoria, where the Crown is not liable in tort. If two men cross Flinders-street and are run down by the police patrol car through the negligence of its driver, and they are both residents of Victoria, they may sue the driver, but not the Crown. If one happened to have his place of abode in New South Wales, he might sue and obtain a judgment in the High Court for damages against the Victorian Government, whilst his friend would be without remedy.

It seems to follow from this interpretation of section 75 (iii) that the Commonwealth and the States are in a similar position. There seems to be no logical reason for saying if by reason of section 75 (iv) the liabilities of the States are fixed, that the liabilities under section 75 (iii) of the Commonwealth are any less, and yet it seems irrational according to the notions of English lawyers to suppose that the legislature of a sovereign government cannot determine the liability of that government both prospectively and retrospectively.

Section 75 (iv) gives original jurisdiction between the residents of different States. In America, citizens of different States were entitled to resort to the United States Supreme Court, and we can see no better reason for this provision in the Australian Constitution than the desire to imitate an American model. The courts of no State were ever, so far as we are aware, accused of partiality towards their own citizens, nor does there seem any reason for suspecting them of it. Residence seems to be a strange criterion, moreover, to adopt. Some persons have no residence, and some

have several. Corporations have been held for this purpose incapable of having a residence, although they have found that when liability is made to depend under revenue laws upon the residence within the territory of a taxing government, residence has been readily ascribed to them. A difficulty further arises as to the word 'between'; if a trust is created in favour of a number of persons, some of whom live in one State and some of whom reside in another, and the controversy arises as to the proportion in which they share the trust property, it has been suggested in the High Court that there is no matter between residents of different States. It is said that there is no issue between residents of different States although there may be one among them. In other words, it is suggested that there must be a claim of right between one or more residents of one State against one or more residents of another State. Again, when must residence attach? If a resident of Victoria is sued in the High Court by a resident of New South Wales, may he defeat the action by instantly changing his residence to Sydney?

Section 75 (iv) gives the High Court jurisdiction in all matters in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth. State officials are frequently invested with some authority under Federal legislation. Persons who may not be considered officers of the Government are frequently appointed to fulfil statutory functions of an unusual character, e.g. the Dried Fruits Board, the Development and Migration Commission and Royal Commissioners. Are they officers of the Commonwealth within the meaning of this provision? Whether a State judge exercising Federal jurisdiction pursuant to section 39 (2) of the Judiciary Act was an officer of the Commonwealth, or otherwise amenable to writ of prohibition, excited so much difference of opinion in the only proceeding in which it was investigated that no judgment was ever given. *R.* v. *Murray, ex parte Cormie* (22 C.L.R., 437.)

Again, three remedies are mentioned—mandamus, prohibition or injunction. Each is discretionary, although the rules governing the discretion vary. Two are common law, and one is equitable. How much of the common law governing the character and nature of these remedies, the procedure by which they are administered, the occasions upon which they may be granted, is stereotyped and made immutable by this provision? It seems clear that, in a suit for an injunction against an officer of the Commonwealth, the court cannot do what a State court might well do—decline the injunction, but nevertheless make a declaration of right.

Under section 76, Parliament is given power to confer original jurisdiction on the High Court in any matter *inter alia* relating to the same subject-matter claimed under the laws of different States. So far the meaning of this and the application of it has been elucidated by no one.

The observations we have made represent criticism instances of which might be multiplied almost indefinitely. Broadly, they arise from the fact that jurisdiction has been conferred upon a court on certain very limited matters by reference to considerations or

criteria which have no relation to the practical administration of justice, but to circumstances which arise or features which are exhibited only accidentally or incidentally in the ordinary administration of justice, and this has been done from motives which ignore the efficient, speedy and orderly administration of the law, and concentrate upon the political expediency of a particular tribunal retaining control over particular questions which may be expected to arise, or dealing with particular persons who it was thought (why, we do not know) might be the subjects of injustice in State courts. The confusion which has resulted has been greatly increased by the complicated devices to which we have already referred, to which the legislature has resorted to prevent appeals being taken to the Privy Council.

Section 74 of the Constitution provided that no appeal should be permitted to the Privy Council from a decision of the High Court upon any question howsoever arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional power of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by His Majesty in Council.

In other matters the power of the Privy Council to give leave to appeal from the decision of the High Court was preserved, subject to the power of Parliament to limit it by laws which were not assented to in the ordinary manner, but which were reserved by the Governor-General for His Majesty's pleasure. The existing right of appeal from the Supreme Court direct to the Privy Council was not affected by the Constitution, and, indeed, when it was passed by the Imperial Parliament, the Attorney-General of Great Britain assured the House of Commons that it could not be affected. This resulted, however, in it being possible to canvass before the Privy Council the correctness of a constitutional precedent established by the High Court by a decision from which no appeal could directly be brought by reason of section 74, because a person who desired to have it reviewed by the Privy Council might raise litigation in the Supreme Court of the State, and then appeal direct to the Privy Council from the judgment of the Supreme Court following the precedent. With a view to avoiding this, Parliament in 1903 resorted to a device under section 77. Section 77 (ii) enabled the Federal Parliament upon any or all of these nine matters to define the extent to which the jurisdiction of any Federal court shall be exclusive, although it belongs to or is invested in the courts of the States. In order to prevent appeals upon matters affecting Federal laws or the Constitution to the Privy Council, this provision has been employed. It was not considered possible for the Federal Parliament to prevent an appeal to the Privy Council from the Supreme Courts if a matter be entertained and decided by them in virtue of the jurisdiction which they possessed, but it was considered possible by the use of section 77 to deprive the Supreme Courts of jurisdiction in any such matters so that they could not be decided by the Supreme Court, and so that no decision would ever be given from which there would be an appeal to the Privy Council.

In cases falling within the description of section 74, in which the Privy Council could not grant special leave from a decision of the High Court, it was considered desirable to deprive the Supreme Courts of all jurisdiction. In cases which did not fall within that description, but nevertheless fell within the descriptions of sections 75 and 76, it was considered sufficient to deprive them of all State jurisdiction and to confer upon them the same actual jurisdiction over the same subject-matters as Federal jurisdiction, i.e., power derived from the authority of the Federal Parliament, and to provide that there should be no appeal from the exercise of that jurisdiction save to the High Court. The validity of these provisions has been established by decisions of the High Court, although two of the more considerable objections to the validity of the provision, which entirely excludes the jurisdiction of the Supreme Court in cases falling within section 74, do not seem to have been adverted to by the Court, or brought to its notice. The Federal Parliament passed these provisions, which are contained in sections 38A and 40A of the Judiciary Act pursuant to the power given by section 76 (i), which provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under this Constitution or involving its interpretation. It may be said that many matters may come within the description contained in section 74 which do not arise under this Constitution or involve its interpretation. Indeed, all questions as to the limits *inter se* of the constitutional powers of any two or more States must depend on matters outside the Constitution, and many matters relating to the powers of the Federal Parliament need not arise under the Constitution or involve its interpretation. For instance, questions may arise relating to constitutional powers under the *Colonial Courts of Admiralty Act* 1890, or under the Merchant Shipping Act. Again, section 77 (ii) enables the Parliament to define the extent to which the jurisdiction of any Federal court shall be exclusive of that which belongs to or is invested in the Supreme Court. It does not seem to be clear that the word 'exclusive' enables Parliament to deny jurisdiction to one court of the State. Indeed, it may be said that in correct English the jurisdiction of the High Court is not exclusive at all, if it is shared by all the courts of the States save one. But it is not likely that, if these questions are raised, the decision supporting the provisions will be overruled.

This scheme was carried into effect in two stages. When the Judiciary Act was originally passed (in 1903), it was decided that so much of the jurisdiction which State courts exercised by virtue of the mere fact that they were courts of justice administering the law without regard to the source whence it came, as fell within the description of matters set out in sections 75 and 76, should be replaced by a Federal jurisdiction, i.e., a power to adjudicate precisely the same in all respects save one, viz., that it proceeded from the Federal Parliament. The object of making this change in the authority whence the power was derived without altering its nature or extent was to enable the Federal Parliament to regulate some of the incidents of its exercise: to impose conditions, the most important of which was that no appeal should

lie to the Privy Council. The plan which was put into effect by section 39 of the Judiciary Act consisted in first depriving State courts of jurisdiction in respect of the nine possible subjects of Federal jurisdiction, and then granting them Federal jurisdiction over the same subject matters. The first step was taken under section 77 (ii) of the Constitution, which empowers the Parliament to define the extent to which the jurisdiction of any Federal court shall be exclusive of that which belongs to or is invested in the courts of the States. The second step was taken under section 77 (iii), which empowers it to invest State courts with Federal jurisdiction. The plan and the constitutional provisions upon which it rests are lucidly expounded in . . . the judgment of Mr. Justice Isaacs in *Baxter's case* [*see* pp. 90-92 of this report].

It will be seen from this that when this scheme comes to be applied practically in the ordinary work of the courts of the State, from the lowest to the highest, two questions will arise which should be adverted to in every case. They are: (1) Does this case relate to any one of the nine matters set out in sections 75 and 76; (2) If so, how do the conditions imposed by the second sub-section of section 39 of the *Judiciary Act* 1903-26 affect the matter?

We have already discussed the difficulty of interpreting and applying the definition of these nine criteria of jurisdiction because of their artificial character. The operation of section 39 is to make it a necessity in every case before every court in Australia, whenever the 'conditions' set out in section 39 (2) affect the matter, to consider and apply these criteria. . . .

These conditions really touch the ordinary practical work of of the courts at two points, viz.:—(1) the constitution of the court of summary jurisdiction; (2) the right of appeal direct to the High Court. But innumerable instances can be supplied of the anomalous manner in which even the two conditions operate. The simplest illustrations perhaps will best show the extraordinary effect which may be produced. If a complaint is brought in the Petty Sessions at Melbourne for money lent it will probably be heard by two or more justices, and speedy justice will be done. But if it is afterwards discovered that one of the parties resided in another State, their order will be void, because the justices heard a matter between residents of different States, and section 39 (2) (*d*) required a police magistrate alone to hear it. Even if a police magistrate had presided over the justices, their presence would have vitiated the proceedings, because he should have sat alone. (*Sanderson* v. *Crawford*, 1915, V.L.R., 21, *Argus* L.R., 368.) If a boy is prosecuted before justices of the peace under a municipal by-law for riding a bicycle on the footpath, and objects that he did so in the performance of his duties as a messenger of the Post and Telegraph Department, and that the by-law cannot affect him, however untenable his objection may be as a defence, yet instantly the justices lose their jurisdiction, because the interpretation of the Constitution is involved. (See *Troy* v. *Wrigglesworth*, 26 C.L.R. 305.) So, if a tramp about to cross the bridge at Swan Hill is arrested for vagrancy and is intelligent enough to object that he is engaged in interstate commerce and cannot be

obstructed, a matter arises under the Constitution. His objection may be constitutional nonsense, but his case is at once one of Federal jurisdiction. In all three instances, even if it had happened that a police magistrate alone had dealt with them, an appeal would lie from his order to the High Court. Moreover, if the justices sit alone or with him, although the tribunal have no jurisdiction, yet an appeal lies from their unlawful proceedings to the High Court because the jurisdiction which they purport to exercise is in fact Federal. It will be noticed, also, that at least in the case of a matter between residents of different States, neither the court nor the parties may know of the facts which render the jurisdiction Federal. But a still greater confusion arises in relation to the very large area covered by the description 'matters arising under a law of the Commonwealth.' This covers every proceeding for debt upon a cheque, promissory note, or bill of exchange, every proceeding in which the Service and Execution of Process Act is availed of, every action for infringement of a patent, a trade mark, a registered design or of copyright, all litigation relating to marine insurance, every revenue matter, (Land Tax, Income Tax, Estate Duty, Amusement Tax), every legal proceeding by or against bodies constituted by Federal statute, such as the Commonwealth Bank, the War Service Homes Commission, all prosecutions for summary or indictable offences under any law of the Commonwealth whether it be the Crimes Act, the Customs Act, the Immigration Act, the Conciliation and Arbitration Act, the compulsory training provisions of the Defence Act, or the compulsory voting provisions of the Electoral Act. There is, therefore, a very considerable body of law to be administered which falls under this category. But because of its very volume and its varied character, it would be impracticable to confer upon the High Court original jurisdiction to deal with it.

This involves the important consequence that the High Court had no jurisdiction upon matters arising under the laws of the Commonwealth which could be made exclusive. The plan of section 39 (2), therefore, failed to effectively deal with this vast field. Instead of divesting the courts of 'State' jurisdiction and investing them with Federal jurisdiction in lieu thereof, it left them with their State jurisdiction and invested them with Federal jurisdiction as a cumulative or an additional jurisdiction.

The jurisdiction possessed and retained is not subject to the conditions set out as (*a*), (*b*), (*c*) and (*d*) in section 39 (2). The Federal jurisdiction, although identical in extent, nature, and effect, is subject to these conditions. How then can this double jurisdiction be administered? It has been emphatically decided that there is nothing to prevent the addition of Federal jurisdiction to State jurisdiction upon the same subject: *Lorenzo* v. *Carey* (29 C.L.R., 243). In *Booth* v. *Shelmerdine* (1924, V.L.R., 276), Mr. Justice McArthur had to deal with a case in which a matter arising under a law of the Commonwealth was decided by a court of Petty Sessions which included justices of the peace. He held that they lawfully exercised State jurisdiction to the exclusion of the Federal jurisdiction invested in the same court, subject to the condition that it should be constituted of a police magistrate alone.

He said that counsel had contended that this conclusion 'leads to a ridiculous or impossible position; that with regard to the same subject-matter you cannot superimpose one jurisdiction on top of another; one with and the other without specified conditions or restrictions.' The answer to this contention is, I think, that the judgment of the High Court in *Lorenzo* v. *Carey* (1921, 29 C.L.R., 243) says quite clearly, as it appears to me, that it is not an impossible position; that one court can be invested with two separate and distinct jurisdictions—that is to say, jurisdictions derived from two separate and distinct authorities. *See* page 252: 'An agent may have a valid authority from a number of independent principals to do the same act. When Federal jurisdiction is given to a State court and the jurisdiction which belongs to it is not taken away, we see no difficulty in that court exercising either jurisdiction at the instance of a litigant.' He proceeded to say that counsel 'then contended that, assuming that the court is invested with both a State jurisdiction and a Federal jurisdiction over the same subject-matter, the former being an unfettered jurisdiction—that is to say, unfettered by any of the conditions and restrictions specified in section 39 (2) of the Judiciary Act, and the latter being fettered by such conditions and restrictions, the court must exercise its Federal jurisdiction. But if this be correct, then it follows that it cannot exercise its State jurisdiction; in other words, that it is in effect deprived of its State jurisdiction. But the Federal Parliament cannot deprive the State court of its State jurisdiction, except in the way provided by the Constitution, viz., by conferring original jurisdiction on a Federal court and making that jurisdiction exclusive of the jurisdiction of the State court under section 77 (ii) of the Constitution. That admittedly has not been done in the present case, and I therefore cannot agree with the contention that in the circumstances of this case the State court must exercise its Federal jurisdiction, such contention necessarily involving, as I think it does, the conclusion that the State court is deprived of its State jurisdiction'. He agreed with the observations of counsel that 'in a case such as this, where the court *ex hypothesi* may exercise either one of two jurisdictions over the same subject-matter, it is difficult to lay down any rule whereby to test which jurisdiction the court is exercising. In the judgment in *Lorenzo* and *Carey* at page 252 it is said: 'We see no difficulty in that court exercising either jurisdiction at the instance of a litigant'. In the present case the court, in my opinion, exercised its State jurisdiction at the instance of the litigants, through their legal advisers'. This seems to represent the effect of the provisions of section 39 in relation to section 76 (ii) as worked out by the High Court. The result may be summarized as follows:—

(1) In a case arising under a law of the Commonwealth a State court has two jurisdictions derived from different sources.

(2) It may exercise either at the instance of a party.

(3) It is not decided whether the election resides with the Court or with one of the parties, and if so which of them.

(4) The exercise of one or the other depends upon some mental act on the part of the court which may be inferred from its conduct, but is not necessarily disclosed or known.

(5) The right of appeal depends upon the choice.

(6) The constitution of the tribunal in cases of summary jurisdiction may differ according to the choice.

(7) If the tribunal possesses both 'jurisdictions' it would seem to follow that it at least may and perhaps must exercise both at once.

(8) The result would be that an appeal lies to the High Court under section 39 (2) (*b*) from the decision in so far as it is given in the exercise of 'Federal jurisdiction' and only to the State court in so far as it is given in the exercise of State jurisdiction. In order to vacate a single order given under both simultaneously, it might thus be necessary to have simultaneous appeals and concurring decisions.

Of course, this is a *reductio ad absurdum*. But take the following example: Suppose an action is brought in the County Court by a plaintiff against a private individual for the following causes of action:—(1) passing off; which is exclusively State jurisdiction; (2) infringement of a trade mark; which is State and/or Federal jurisdiction, and the registrar of trade marks is joined; and (3) an injunction is sought against him; which is exlusively Federal (by reason of section 75 (v)). We think no one can give a confident answer upon the question what jurisdictions the ation is tried in and what appeals lie.

In 1907 it was found necessary or desirable to add further provision to prevent appeals to the Privy Council from the Supreme Court, and sections 38A and 40A were inserted in the Judiciary Act. Effectual as these provisions have been for this purpose they have necessarily added much complexity to an extremely intricate situation.

Indeed, the intricacies of these sections and their peculiar operation can only be appreciated adequately after prolonged study of the decisions given in relation to them and to section 74 of the Constitution. See *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1917, A.C., 528); re *Drew* (1919, V.L.R., 600); *Rex* v. *Maryborough Justice* (27 C.L.R., 249); *Hudson* v. *Australian Timber Workers' Union* (32 C.L.R., 413); *Pirrie* v. *Macfarlane* (36 C.L.R., 170); *Commonwealth* v. *Kreglinger* (37 C.L.R., 393).

No doubt it is by no means easy to arrive at a clear understanding of the operation of these provisions from a mere consideration of the authorities, but this merely serves to support the conclusion which we are desirous of suggesting to the Commission that as a result of the provisions of the Constitution and those of the Judiciary Act 'Federal jurisdiction' forms a grave impediment to the practical administration of justice. We think this confusion and all the difficulties which attend it ought to receive the serious attention of those interested in maintaining a Federal system of justice which is speedy, efficient and practical."

The following extract is taken from the evidence of Mr. J. E. Clark (p. 1219):—

"There is one other matter I would like to mention in connexion with a case that came under my notice. Under the Constitution, the High Court has original jurisdiction in actions between residents of different States. That jurisdiction was taken away from the State courts and revested in them on certain conditions, that is, when the inferior court is constituted by a police, stipendiary, or special magistrate. We had a case here in which we sought to enforce a maintenance order made by a court in South Australia against a man who was resident in Broken Hill. He deserted his wife in South Australia and went to Broken Hill, and had not sent any money to her. She applied to the South Australian court and got an order; then it was brought here under those interchanges of Maintenance Order Enforcement Acts, and the officers of the department sought to enforce it in Broken Hill, but the objection was taken there that the head order was not good because it was not made by a court of proper jurisdiction under the Act. The South Australian court was constituted of two justices of the peace and the stipendiary magistrate sitting together, therefore the South Australian court had no jurisdiction to make an order against this man, he being a resident of another State. It came down here and was before Mr. Justice Campbell on appeal, and we managed to win the first round, but merely on the ground that the evidence did not say that he was a resident of this State within the meaning of the Constitution. When it went back, evidence was adduced showing that he was a resident of New South Wales at the time, and so the woman has lost all her maintenance and has no chance of getting it. That comes under a section of the Judiciary Act, and the question arose before in the case of *Coates* v. *Coates* 1925, V.L.R., 231."

X.—EXTERNAL AFFAIRS.

Under this heading it is proposed to indicate briefly (*a*) the part taken by the Commonwealth in conferences with the Governments of Great Britain and the Dominions; (*b*) the part played by the Commonwealth in international conferences; (*c*) the manner and extent to which the Commonwealth has or may become bound by treaties and agreements; and (*d*) the manner in which the Commonwealth has been or may be brought into contact with other countries in the exercise of the powers of legislation conferred on the Commonwealth Parliament by the Constitution.

Conferences with the Governments of Great Britain and the Dominions.

Prior to the establishment of the Commonwealth each of the six Colonies had been separately represented at Colonial Conferences and each had had one vote. Subsequently to the establishment of the Commonwealth the Commonwealth Government alone represented the people of Australia. As is indicated elsewhere in this report, this position was not conceded without protest from certain of the States, but was maintained both by the Government of the Commonwealth and by the Government of Great Britain.

Colonial or Imperial Conferences were held in the years 1902, 1907, 1911, 1917, 1921, 1923, and 1926. Each of these Conferences with one exception has been attended by the Prime Minister of Australia. At some, but not at all, he has been accompanied by another Minister of State. In the year 1924 it was proposed by the British Government that for the purpose of securing continuity of policy representatives of the Opposition for the time being, as well as of the Government, of the Dominions, should attend these Conferences, but the practicability of the suggestion was questioned by the Prime Minister of Australia and it was opposed by the Prime Minister of Canada and abandoned. In addition to the Colonial or Imperial Conferences, at which numbers of subjects of common interest have been discussed, Conferences have been held from time to time on special subjects. Among the most notable of these Conferences have been the Navigation Conference of 1907, the Education Conference of 1907, the Defence Conference of 1909, and the Economic Conference of 1923. Representatives of the Dominions prior to the War were from time to time invited to take part in the sittings of the Committee of Imperial Defence, and the right of the Dominions to send representatives to explain their views before this Committee was acknowledged by the representatives of Great Britain at the Conference of 1907.

In the years 1917 and 1918, the Prime Ministers of the Dominions, including the Prime Minister of Australia, were members of the War Cabinet, but they were not consulted on the terms of the Armistice.

At the Conferences held prior to 1911, the subjects which have occupied the greater part of the discussions have been defence, preferential trade, and the means of consultation between the Governments of Great Britain and of the Dominions. The Conference of 1911 was remarkable for a discussion on foreign affairs initiated by a review of the relations of Great Britain with other countries, by the Secretary of State for Foreign Affairs, and in particular for a discussion of the proposed renewal of the Anglo-Japanese Alliance.

At all these Conferences other matters were discussed, some of which were the subject of resolutions. These resolutions deal with, *inter alia,* penny postage, improved mail services, uniformity of company law, the protection of patents and copyrights, and naturalization.

At the Imperial Conference of 1917 it was arranged that, in future, communications should be between the Prime Minister of Great Britain and the Prime Ministers of the Dominions, and a resolution was carried that a special conference should be held after the war for the purpose of defining the relations of the Dominions to each other, and to the Government of the United Kingdom. A resolution was also passed in favour of extending equal rights of citizenship to Indians resident in the Dominions. In 1921 the subjects most prominent were the Anglo-Japanese Alliance and the forthcoming International Conference to be held at Washington. In 1923 a detailed resolution was passed on the subject of the rights of the Dominions to make treaties and the extent to which Dominions were bound by treaties to which they were not parties. In 1926 a Committee was appointed to draw up a report on all the questions of the agenda in relation to Inter-Imperial Relations. No Conference of Ministers, however, has been held in accordance with the resolution of 1917. At the Conference of 1921, Mr. Hughes, Prime Minister of Australia, declared himself at a loss to understand what was contemplated by the resolution of 1917, and at the Conference of 1926, Mr. Bruce, Prime Minister, declared that "it would be disastrous to attempt to lay down something in the nature of a written Constitution that is going to govern us in the future. It is quite impossible for an Empire progressing continually to have such a document. If we had had it in the past, either it would have had to be torn up, or it would have destroyed the Empire". This attitude has also been maintained by Mr. Bruce in his answer to a proposal made by Mr. Ramsay MacDonald in 1924 that each Dominion should send representatives to London for the purpose of a preliminary discussion on the subject of Inter-Imperial Relations (*infra*), an answer in which the Prime Minister of South Africa concurred. In the Report of the Inter-Imperial Relations Committee of 1926, however, some attempt was made to define the relations of the Dominions. The definition, which refers to the autonomy, equal status, common allegiance to the Crown, and free association marking the position and mutual relations of Great Britain and the Dominions from a constitutional point of view, must be read in conjunction with the explanation which follows in the Report, under the heading "Status of Great Britain and the Dominions" (*see* Appendix C).

Participation in International Conferences.

The participation of the Commonwealth as of right in International Conferences of a political character began with the Peace Conference of 1919. Prior to the War the Commonwealth was independently represented at the International Radio Telegraphic Conference of 1912, and the credentials of the Commonwealth representative were then issued by His Majesty "on behalf of the Commonwealth of Australia". At the Peace Conference of Versailles, Australia was independently represented and in plenary sessions her representatives took part on the same footing as representatives of the Allied and Associated Powers. Upon the Council of Ten the Prime Minister of Australia, as of others of the Dominions, was from time to time associated with a member of

the British Cabinet as one of the two British representatives. Upon the Council of Four a member of the British Cabinet spoke on behalf of the whole British Delegation, which consisted of three British delegates, the Dominion Ministers, and a representative of British India. During the whole of the Conference the Dominion delegates, as members of the British Empire Delegation, were in touch with the proceedings and had access to all papers, and from time to time Dominion Ministers represented the British Empire on Commissions appointed to consider special aspects of the conditions of Peace.

The procedure established at Versailles was partially followed at the Washington Conference of 1921-1922. The invitation of the President of the United States was issued to the Government of the United Kingdom alone, but at the Conference the Dominions were represented by plenipotentiaries of their own, and regular meetings of the British Empire Delegation were held at which all important questions were discussed. At the Inter-Allied Conference on Reparations held in London in 1924, the procedure of the Peace Conference was followed after considerable preliminary discussion, and at the Naval Conference held at Geneva in 1927 the right of the Dominions to be separately represented on the same footing as the United States and Japan was conceded. The Kellogg Peace Pact 1928, which was concluded after correspondence, was signed by representatives of each Dominion separately as well as by a representative of Great Britain.

The right of the Dominions to separate representation at International Conferences has not, however, been invariably acknowledged by other countries. The Dominions were not separately represented at the Conference held at Lausanne to arrange peace with Turkey, mainly, it is said because of the opposition of the French Government, and the resulting treaty was ratified by the Governments of Australia, New Zealand and South Africa, but not by the Government of Canada. At the Conference of Locarno the Dominions were not represented, and the pact resulting from the Conference was expressed so as not to impose active obligations on a Dominion without its concurrence.

Treaties.

The question how far a Dominion is bound by a treaty purporting to be executed on behalf of the British Empire or is itself entitled to conclude a treaty is to some extent bound up with the question of the right of a Dominion to participate in International Conferences. Both these questions were discussed at the Imperial Conference of 1923 and are the subject of recommendation by the Committee on Inter-Imperial Relations appointed in 1926 (*see* Appendix C). In a great number of treaties of a commercial or technical character concluded by the Imperial Government provision is made that the treaty shall not be binding on any of the self-governing parts of the Empire unless it has expressly adhered to the treaty, and in others there is provision that a Dominion may exclude itself from the operation of the treaty. The Commonwealth has exercised the right of exclusion in relation to a great number of treaties which were thought to be inconsistent with national policy, and has not acceded to a number of commercial treaties concluded by the Imperial Government since the War. The right of a Dominion to make political treaties with a foreign country is, subject to the observations contained in the Report of the Inter-Imperial Relations Committee of 1926, the same as that of the government of

the United Kingdom. The government of the Commonwealth has not as yet exercised this right. It has however from time to time entered into agreements with other countries which are not formulated as treaties, and which relate to some specific aspect of Commonwealth policy. One series of these related to merchants, tourists, ministers of religion, and students visiting Australia from Japan, China, India, and other Eastern countries for a limited time only. Another series entered into during the years 1924 and 1925, after the commencement of the recent immigration legislation in the United States, related to the issue of passports to would-be immigrants into Australia by the governments of Italy, Greece, Albania, Czecho-Slovakia, Yugo-Slavia and Malta.

At the Imperial Conferences of 1907 and 1911 suggestions were made for the improvement of the means of consultation between the different Governments within the British Empire. At the Conference of 1907 a resolution was carried on the motion of Mr. Deakin in favour of the establishment of a permanent Imperial Secretariat, and at the Conference of 1911 Mr. Fisher suggested that Conferences be held annually.

In 1924 a circular telegram signed by the Prime Minister of Great Britain, Mr. Ramsay MacDonald, and by the Secretary of State for the Dominions, Mr. Thomas, was addressed to the Governments of the Dominions, in which, after referring to the resolutions of the Imperial Conference of 1917, suggestions were made for the improvement of methods of consultation. The reply of the Prime Minister of Australia sets out the existing difficulties and the methods proposed for meeting them:—

> "It is, of course, obvious that in practice there are two main difficulties in establishment of an effective system of joint consultation and action, namely (*a*) the impossibility of full exchange of views when the Imperial Conference is not sitting, particularly in the sphere of foreign policy where immediate action is imperative, and (*b*) the possibility of conclusions of Imperial or Economic Conferences being reversed through change of government.
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> The problems which have to be considered appear to divide themselves into: (1) the manner in which an Imperial policy should be laid down in regard to matters of common Empire interest, such as foreign policy, defence, and inter-Empire trade. (2) How should consultations take place with regard to giving effect to such policy when determined upon and for its alteration where necessity arises? (3) What steps can be taken to ensure that any common policy arrived at will be given effect to irrespective of change of government in different parts of the Empire?
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> With regard to (1) it is now an established principle of Empire Government that Prime Minister Conferences shall take place at frequent intervals. At these Conferences a common Empire policy on questions of Imperial interest can be arrived at and submitted by the respective Prime Ministers to their individual Parliaments for their ratification and assent. The machinery for ensuring a common policy therefore already exists by holding of the Imperial Conferences, and no alteration of existing practice appears either necessary or desirable.
>
> (2) It is unavoidable that questions of urgent foreign policy must be dealt with according to the circumstances in which they arise,

and they are therefore in an entirely different category from other matters upon which a common policy may have been determined at an Imperial Conference. It appears to my Government therefore that no alteration in the underlying principle of consultation which at present exists is practicable, but considerable improvements could be effected in the operation of such machinery. These improvements should be on lines of—(*a*) a closer liaison between the Foreign Office and Dominion Governments, which could be effected by the establishment by the Dominions of a Foreign Office Branch in their High Commissioners' Offices under the control of an officer of such standing and character as to enjoy the confidence of the Foreign Office; such a representative would be in a position to keep his Prime Minister informed in regard to current events and atmosphere in connexion with foreign policy, in addition to information which is conveyed by cable to the Prime Minister and by information at present sent from time to time by the Foreign Office. (*b*) Fuller and more regular advice in regard to all questions of foreign affairs, both by cable and mail, than is at present forwarded to the Prime Ministers of the self-governing Dominions. (*c*) Greater efforts to anticipate questions which are likely to arise and require urgent decision, with a view to ascertaining the views of the Dominions in advance, in place of informing them of decisions after they have been arrived at and acted upon or when it is too late for any alternative action to be submitted.

With regard to questions other than foreign policy, my Government is of the opinion that the establishment of a permanent Imperial Secretariat responsible to the Prime Ministers of all the self-governing parts of the Empire, whose task would be to prepare for the Imperial Conferences, carry out all Secretariat work during the sittings of such Conferences, follow up all resolutions and decisions arrived at, and keep the Dominions constantly informed of developments between the Conferences, would go a long way towards solving the problem of effective and continuous consultation. This Secretariat would also embrace existing Imperial Committees such as the War Graves and Shipping, and the Economic Committee when established. It would not merely be a connecting link between the individual Dominion Governments and the British Government, but also between the Governments of the different Dominions. At the present time the Secretariat for Imperial Conferences is provided by the British Government, together with representatives of the Dominions concerned, but immediately the Conference is over the Secretariat is broken up, and no effective machinery exists for keeping the Dominions continuously informed as to developments or alterations necessitated by changed circumstances. In the opinion of my Government a great improvement would be effected by the establishment of a permanent Imperial Secretariat."

As an illustration of the defects in the then existing methods of consultation reference may be made to the absence of the Australian Prime Minister from the Conference of 1917 owing to a parliamentary crisis, and to the Chanaq Incident of 1922. On the 15th September, 1922, a telegram was addressed by the Prime Minister of Great Britain, Mr. Lloyd George, to the Prime Minister of each Dominion, regarding

the relations of Great Britain and Turkey in which he invited the Dominions to be represented by contingents "in defence of interests for which they had already made enormous sacrifices." The Australian Government replied, on or before the 17th September, "that it desired to associate itself with His Majesty's Government in whatever action might be deemed necessary to ensure the freedom of the Straits and the sanctity of the Gallipoli Peninsula," but stating that the opinion of Parliament would be taken on the matter on the 19th September. It appears that the telegram of the British Government was the first official intimation that had been received by the Dominion Governments of a situation in the near East which had reached a critical stage and with respect to which there was reason to anticipate the necessity of making any kind of appeal for military assistance.

Subsequently to the date of the telegram of the Australian Prime Minister set out above, the Australian Government has maintained in London a liaison officer for foreign affairs, who is in touch with the Foreign Office and is in communication with the Prime Minister's Department and with the Prime Minister himself. Following the report of the Inter-Imperial Relations Committee the Governor-General of Australia ceased to communicate with the Imperial Government on Australian affairs. Despatches are now addressed by the Prime Minister of the Commonwealth to the Secretary of State for Dominion Affairs. The Government of Australia has not, as the Government of Canada has, appointed a diplomatic representative to Great Britain, nor has it received a diplomatic representative from Great Britain. Australia is represented in the United States by a Commissioner, who has not diplomatic status, and it has not appointed a diplomatic representative to any foreign country.

League of Nations.

From the establishment of the League of Nations in pursuance of the treaty of Versailles the Commonwealth became a member of the League with rights equal to those of the other Powers who were not permanent members of the Council. Upon the issue of Mandates in 1919 the Commonwealth as a mandatory became responsible for the territory of New Guinea and jointly with Britain and New Zealand for the government of Nauru. The manner in which the duties of a mandatory are discharged by the Commonwealth is set out in the section of this report dealing with Territories. The Commonwealth is in touch with the Secretariat of the League at Geneva and sends delegates to the annual meeting of the Assembly of the League. The Commonwealth has not been elected to a seat on the Council of the League, as Canada has, nor has it been a candidate, as the Irish Free State has. The Commonwealth is also an original member of the International Labour Organization of the League, and is represented at its annual meetings or conferences. Such conferences may adopt a draft convention by a two-thirds majority, but these conventions in relation to a Federal Government take the form of recommendations only, and none of them has been ratified or given legislative sanction by the Commonwealth.

New Hebrides.

The Commonwealth has interests in land in the New Hebrides and is represented by an official stationed in the group, whose duty it is to safeguard Commonwealth interests in litigation on land matters. The

Commonwealth was not consulted on the Condominium Convention of 1906 until after the terms of the Convention had been settled between the British and French Governments. The Commonwealth was consulted during the negotiations for a new Convention, which took place prior to 1914, and on the Convention which was agreed upon in 1920.

The Commonwealth has for some time subsidized a mail service to the New Hebrides (*see* evidence p. 1,428).

Contact with other countries through legislation.

The Commonwealth Parliament may make laws for the peace, order and good government of the Commonwealth with respect to a number of subjects which bring the government of Australia into contact with the governments of other countries. Among these subjects are: (1) trade and commerce with other countries; (2) postal, telegraphic, telephonic and other like services; (3) the naval and military defence of the Commonwealth; (4) quarantine; (5) fisheries in Australian waters beyond territorial limits; (6) copyrights, patents of invention and design, and trade marks; (7) naturalization and aliens; (8) foreign corporations; (9) the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws; (10) immigration and emigration; (11) the influx of criminals; (12) external affairs; and (13) the relations of the Commonwealth with the islands of the Pacific.

In the exercise of one or more of these powers the Commonwealth Parliament has passed the *Pacific Island Labourers Act* 1901-1906; the *Immigration Act* 1903-1925; the *Extradition Act* 1903; the *Naval Agreement Act* 1903-1912; the *Contract Immigrants Act* 1905; the *Wireless Telegraphy Act* 1905-1919; the *Pacific Cable Act* 1911; the *Treaty of Peace Act* 1919; the *Treaty of Peace (Germany) Act* 1920; the *Treaty of Peace (Austria and Bulgaria) Act* 1920; the *Treaty of Peace (Hungary) Act* 1921; the *Treaties of Washington Act* 1922; the *Passports Act* 1920; the *Naturalization Act* 1903-1917; the *Nationality Act* 1920-1925; the *Customs Tariff (New Zealand Preference) Act* 1922-1926; and a number of Acts relating to the export of primary products.

The Commonwealth Parliament has also by the *Commonwealth Electoral Act* 1925 admitted Indians resident in Australia to the Commonwealth franchise in pursuance of resolutions passed at the Imperial Conferences of 1917 and 1921, and after the visit to Australia of a representative of India. Indian residents have also been qualified for the old-age pension. By the *Air Navigation Act* 1920 the Commonwealth has empowered the Governor-General to make regulations for the purpose of carrying out and giving effect to the convention for the regulation of aerial navigation signed in Paris on the 30th October, 1919.

The opinion was expressed by Mr. E. L. Piesse (evidence p. 1429) that the means adopted to keep Parliament and the electors informed on foreign affairs are inadequate, and that the establishment of a Parliamentary Committee on Foreign Relations as in France and the United States was highly desirable.

XI.—THE DEFENCE OF THE COMMONWEALTH.

The provisions of the Constitution.

The Commonwealth Parliament may make laws, under paragraph (vi) of section 51 of the Constitution, with respect to "the naval and military defence of the Commonwealth and the several States, and the control of the forces to execute and maintain the laws of the Commonwealth". This power is supplemented by the power conferred by paragraph (xxxii) of the same section to make laws for the control of railways with respect to transport for the naval and military purposes of the Commonwealth. It is to be read too, as other powers are, with the grant of incidental powers in paragraph (xxxix). The question has been suggested whether the power to make laws for the naval and military defence of the Commonwealth includes defence by air, but any such doubt has been ignored in practice, and in *Farey* v. *Burvett* (21 C.L.R. at p. 440) it is said that the words "naval" and "military" are not words of limitation, but rather of extension, showing that the subject matter includes all kinds of warlike operations.

The departments of naval and military defence were included among the departments of the public service in each State which were to become transferred to the Commonwealth on a date or dates to be proclaimed, under section 69 of the Constitution, by the Governor-General after the establishment of the Commonwealth. The defence departments of the States were transferred to the Commonwealth on the 1st March, 1901.

Section 114 of the Constitution forbids a State to raise or maintain any naval or military force without the consent of the Commonwealth Parliament. This section, together with the provision in paragraph (ii) of section 52 with respect to matters relating to transferred departments, makes the defence power of the Commonwealth an exclusive power (*cf. Joseph* v. *Colonial Treasurer* (*N.S.W.*), 25 C.L.R. 46).

The Commonwealth has the duty, under section 119 of the Constitution, to protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence. The obligation to intervene for the protection of a State against domestic violence arises, it seems, where there is in fact domestic violence against which protection is needed, and not merely because a State Government has stated that there is domestic violence and has applied for protection. The machinery for giving effect to the obligation is provided in the *Defence Act* 1903-1927 (see *infra*).

The Constitution itself, by section 68, vests the command in chief of the naval and military forces of the Commonwealth in the Governor-General as the Sovereign's representative. The command in chief cannot, therefore, be vested by the Commonwealth Parliament in any other person or body, though the Parliament may make provision for the administration of the Defence system and the military and naval command of the Defence forces. In effect section 68 ensures that the civil administration and control of those forces shall be in the hands of Ministers responsible to Parliament, as the Governor-General will act on Ministerial advice.

The Defence Power.

The defence power of the Commonwealth rests primarily on the Constitution, and in particular on the provisions which confer power on the Commonwealth Parliament, but besides the legislative power, there is the executive power of the Commonwealth under section 61 of the Constitution, which carries with it the war prerogative of the Crown so far as it is applicable to Australia (see *Farey* v. *Burvett,* 21 C.L.R. at p. 452). Moreover in regard to the making of laws for the enforcement of discipline beyond the limits of the Commonwealth the power is reinforced or supplemented by the provisions of British Acts other than the Commonwealth of Australia Constitution Act—the Army Act, s. 177, and the *Naval Discipline* (*Dominion Naval Forces*) *Act,* 1911, s. 1.

The power of the Parliament under section 51 (vi) is not confined to warlike operations, but extends to every measure of defence which circumstances may require, including preparation for war in time of peace, any such action in time of war as may conduce to the successful prosecution of the war and the defeat of the enemy, and the termination of hostilities by the imposition of terms of peace and the enforcement of those terms (*Farey* v. *Burvett,* 21 C.L.R. at p. 441; *Roche* v. *Kronheimer,* 29 C.L.R. at p. 337).

The scope of the defence power is wider in time of war than in time of peace. Normally the power of the Commonwealth Parliament in regard to defence "extends to the legislative authorization of all such acts and measures as are proper to the subject of 'defence' in its technical or more limited sense, including the raising and training of naval and military forces, and the making of rules for their discipline and government; the providing of arms, ammunition, vessels, fortifications and other works of a like nature; together with all matters incidental thereto, including the control of all railways for naval or military transport. These powers avail both in time of peace and war. . . . . On the intervention of a state of war 'the defence power', operating now as a 'war power', becomes enlarged into what is probably the most far reaching of all the Federal powers" (*Pitt Cobbett, Government of Australia*—unpublished; see *Farey* v. *Burvett,* 21 C.L.R. pp. 452-455). In time of war the Commonwealth Parliament may pass any law, or may give the Executive authority to make any regulation, which it considers necessary for the safety of the country. The Commonwealth in time of war was, for practical purposes, a unified government. This interpretation of the defence power was first pronounced by a majority of the High Court in 1916, when regulations fixing the price of bread under the authority of the *War Precautions Act* 1914-1915 were held to be within the powers of the Commonwealth, a minority of the Justices dissenting on the ground, amongst others, that if this power were necessary to the safety of the country, the States could transfer it to the Commonwealth (*Farey* v. *Burvett,* 21 C.L.R. 433). Thereafter it was held that the Commonwealth could make it an offence, during the war, to encourage the destruction of property (*Pankhurst* v. *Kiernan,* 24 C.L.R. 120), or make a law prescribing conditions on which a person should be deemed to be trading with the enemy (*Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth,* 22 C.L.R. 268), or a law providing for the deportation of aliens arrested or detained on the order of a Minister of State (*Ferrando* v. *Pearce,* 25 C.L.R. 241), or a law providing that the then present state of war should

be deemed to have ceased on the issue of a proclamation by the Governor-General (*Jerger* v. *Pearce,* 28 C.L.R. 588), or a regulation authorizing the Attorney-General to sell shares owned by enemy subjects (*Burkard* v. *Oakley,* 25 C.L.R. 422). Under this interpretation of the defence power regulations were issued during the war making arrangements for the disposal of all wool and sheepskins in the Commonwealth to the Imperial Government and for the acquisition and disposal of a number of other commodities. These regulations were subsequently continued as schedules to the *Commercial Activities Act* 1919. The defence power also authorized the Commonwealth Parliament to pass the *Treaty of Peace Act* 1919, together with the regulations thereunder, the *Australian Soldiers' Repatriation Act* 1917-1918, and the *Australian Soldiers' Repatriation Act* 1920-1922, under which moneys advanced by the trustees of the Australian Soldiers' Repatriation Fund were to have the same priority with respect to the payment of debts as if the moneys had been advanced by the Crown, and goods vested in the Repatriation Commission were not liable to be distrained (*Attorney-General for the Commonwealth* v. *Balding,* 27 C.L.R. 395).

The defence power, however, is subject to certain limitations, most of which apply in time of peace only.

(1) The Commonwealth authorities may control State railways with respect to transport for naval and military purposes, but they may not acquire the railways of a State or build or extend a railway in a State without the consent of the State concerned. The Commonwealth has joined with the States of Queensland and New South Wales in building a railway from Grafton to South Brisbane which may have a distinct military value. A view has been expressed (*see* the evidence at p. 341) that even in time of war the Commonwealth could not take over a railway and staff without the consent of a State, and Colonel Wynter suggested that in order that the defence needs in regard to transportation should be met with the greatest expedition and certainty, and due weight given to the needs of the civil community, the Constitution should explicitly give the Commonwealth the power to take possession of and administer the State railways in time of war.

(2) The Commonwealth may maintain dockyards for the building or repair of ships, and factories for the manufacture of munitions, uniforms and equipment. To maintain throughout a period of peace the nucleus of a staff for emergency and war purposes it has been found convenient, if not necessary, to carry on work for civilian purposes and to enter into contracts with other than the Commonwealth authorities (*see* evidence of Captain E. D. Sydenham, pp. 315-317.) The Shipping Board, for instance, entered into what was popularly known as the Bunnerong Contract to do certain work at the Cockatoo Island Dockyard. The High Court decided that authority to enter into this contract had not been conferred on the Shipping Board by the Commonwealth Parliament, and that a law conferring this authority would have been *ultra vires* the Commonwealth Parliament (*Commonwealth* v. *Australian Commonwealth Shipping Board,* 39 C.L.R. 1). This judgment must add to the difficulties of the Defence authorities in putting Australia in a state of preparation for war or for war emergencies.

(3) The Commonwealth forces are sometimes requested to assist the police of the States in connexion with offences afloat against State

statutes. They have, for instance, been requested to search vessels suspected of illicit fishing. Doubts exist as to the rights and liabilities of members of the Defence Force in these circumstances.

The Commonwealth may, on the application of the Executive Government of a State, intervene for the protection of the State against domestic violence, and it may of its own motion intervene for the protection of the property and services of the Commonwealth, but except under section 119 of the Constitution it has no express obligation to intervene in the event of rioting or violence within a State.

The Defence System.

Provision is made for the defence of the Commonwealth by the *Defence Act* 1903-1927, the *Naval Defence Act* 1910-1918, and the *Air Force Act* 1923, together with the regulations made under those Acts, and the arrangements entered into with the British Government in regard to naval defence. The *Defence Act* 1903 was framed for both naval and military defence. After the Naval and Military Conference held in London in 1909, the Commonwealth Parliament passed the *Naval Defence Act* 1910, which was amended in 1911, 1912, and 1918. A number of the provisions of the Defence Act still apply to the naval as well as to the military forces.

Under these Acts the Governor-General may appoint an Inspector-General of the Military Forces, divide the Commonwealth into Military Districts, appoint a Council of Defence, a Military Board for the administration of the Military Forces, and a Naval Board for the administration of the Naval Forces. The Council of Defence is to have such powers and functions as may be prescribed. Under the Council of Defence Regulations, made under the *Defence Act* 1903-1918, the powers and functions of the Council are (*a*) to ensure that the whole policy of the defence of Australia by the Naval, Military, and Air Forces is consistent generally with Imperial plans, and especially with such of those plans as directly concern Australia, and to issue such instructions in connexion therewith as are necessary; (*b*) to act as the medium of communication with the Committee of Imperial Defence or any other body of a similar nature formed by the Government of the United Kingdom; (*c*) to effect such supervision of the approved defence policy in the Naval, Military, Air, and Munition branches as will ensure its efficient and economical application; (*d*) to co-ordinate the activities of the Naval, Military, Air and Munition branches with each other as well as with those of other Commonwealth Departments and the commercial and manufacturing activities of Australia in so far as is necessary to ensure, in case of need, the mobilization of all resources for the defence of Australia; and (*e*) to advise upon and supervise the total expenditure upon defence and the distribution of that expenditure. Regulations have also been made under the *Defence Act* 1903-1918 and the *Naval Defence Act* 1910-1918, under which the functions of the Air Council are (*a*) to advise the Minister upon the Air Force provision necessary from time to time for the defence of Australia; (*b*) to co-ordinate the Air Force requirements of the Naval and Military Forces respectively, and to advise upon questions of principle affecting command and administration resulting from the distribution of the Air Force; (*c*) to advise the Minister upon all matters of policy or principle affecting the organization, distribution, and preparation for war of such

Air Forces as may be established; (*d*) to allocate the funds made available for air defence; (*e*) to advise upon the general control of Commonwealth air policy in its naval and military aspects and to co-ordinate civil aviation therewith; and (*f*) to advise and make recommendations upon such matters as the Council may direct shall be referred to it from the Air Board.

The Naval and Military Forces of the Commonwealth are divided into two branches, called the Permanent Forces and the Citizen Forces. The Permanent Military Forces are to be raised, maintained and organized only for Administrative and Instructional Staffs, including Staff Corps, Aviation, Survey, Army Service, Medical, Veterinary and Ordinance Corps, Artillery, Fortress Engineers, and Submarine Mining Engineers.

The Citizen Military Forces are to consist of active forces and reserve forces. The Active Citizen Military Forces are to consist of Militia Forces, the Volunteer Forces, those undergoing military training, and officers on the unattached list. The Military Reserve Forces are to consist of Citizen Forces, and are to include the officers shown on the Reserve of Officers List, the members of Rifle Clubs who are allotted to the Military Reserve Forces, and all those liable to serve in time of war, under section 59 of the *Defence Act* 1903-1927, who are not included in the Active Forces.

The Permanent Naval Forces are to consist of officers who are appointed officers of those Forces, and seamen who have enlisted or engaged as members of those Forces, and who are bound to continuous naval service for the term of their enlistment or engagement.

The Citizen Naval Forces are to consist of Naval Reserve Forces and Naval Volunteer Reserve Forces. The Naval Reserve Forces are to consist of officers and seamen who are not bound in time of peace to continuous naval service and who are paid for their services, and of persons who are liable under the Defence Act to be trained in the Citizen Forces and who are allotted to the Naval Forces. The Naval Volunteer Reserve Forces are to consist of officers and seamen who are not bound in time of peace to continuous naval service and who are not ordinarily paid for their services.

The Permanent Military and Naval Forces are at all times liable to be employed on war service and in the defence and protection of the Commonwealth. In time of war the Governor-General may, by proclamation, call out the Citizen Forces or any part thereof for war service. If the Parliament is sitting at the time, the reason for calling out the Forces is to be communicated forthwith by the Governor-General to both Houses. If the Parliament is not sitting, it is to be summoned within ten days after the calling out of the Forces.

Members of the Military Forces are not to be required to serve beyond the limits of the Commonwealth and those of any Territory of the Commonwealth, unless they voluntarily agree to do so. Members of the Naval Forces may be required to serve for training or any naval service either within or beyond the limits of the Commonwealth.

When the Governor of a State has proclaimed that domestic violence exists therein, the Governor-General, upon the application of the Executive Government of that State, may call out the Permanent Forces, and in the event of their number being insufficient may call out

such of the Militia and Volunteer Forces as may be necessary for the protection of the State. The Citizen Forces are not to be called out or utilized in connexion with an industrial dispute. This provision was enacted by the *Defence Act* 1914. In 1912 the Governor of the State of Queensland made an application by telegram to the Governor-General of the Commonwealth, stating that, in consequence of a general strike, riot and bloodshed were imminent in Brisbane, that the State police were not able to preserve order, and that firearms had been used to prevent the arrest of a man guilty of riotous conduct, and requested that the Governor-General should direct steps to be taken immediately to protect the State against domestic violence in terms of section 119 of the Constitution. The Commonwealth Government recommended the Governor-General to send the following reply to the Governor of Queensland:—"That whilst the Commonwealth Government is quite prepared to fulfil its obligations to the States if ever the occasion should arise, they do not admit the right of any State to call for their assistance under circumstances which are proper to be dealt with by the Police Forces of the States. The condition of affairs existing in Queensland does not in the opinion of my Ministers warrant the request of the Executive Government of Queensland contained in Your Excellency's message being complied with" (Parliamentary Papers, 1912, No. 16).

In time of war the Governor-General may place the Defence Force or any part thereof under the orders of the Commander of the King's Regular Forces or the King's Regular Naval Forces, and under certain conditions the Military Forces are to be subject to the provisions of the Army Act.

When any member of the Military Forces is killed on war service or on duty, or dies, or becomes incapacitated from earning his living, from wounds or disease contracted on war service or on duty, provision is to be made for his widow and family or for himself out of the Consolidated Revenue Fund.

In time of war all male inhabitants of Australia who have resided therein for six months and are British subjects and are between the ages of eighteen and sixty years, are, with certain exceptions, to be liable to serve in the Citizen Forces, and the Governor-General may call upon them to enlist and serve according to classes specified in section 60 of the *Defence Act* 1903-1927.

Provision is made for a system of universal naval or military training under Part XII. of the *Defence Act* 1903-1927. The system was established by the Act No. 15 of 1909. Except in the case of persons who are exempt from the obligation, all male inhabitants of Australia who have resided therein for six months and are British subjects, are liable to be trained (*a*) from twelve to fourteen years, in the Junior Cadets; (*b*) from fourteen to eighteen years, in the Senior Cadets; (*c*) from eighteen to twenty-five years, in the Citizen Forces; and (*d*) from twenty-five to twenty-six years, in the Citizen Forces, though in the last case, except in time of imminent danger of war, service is limited to one registration or one muster-parade. Any person who without lawful excuse evades or fails to render the personal service required under the Act, is to be ineligible for employment of any kind in the Public Service of the Commonwealth.

The Governor-General may constitute courts martial. In view of the decisions of the High Court relating to the judicial power of the Commonwealth, which is discussed elsewhere in this report, some doubt has been expressed whether the provisions of the *Defence Act* 1903-1927 relating to courts martial are within the powers of the Commonwealth, though by virtue of section 177 of the Army Act, which relates to forces of a colony employed beyond the limits of that colony, courts martial may rest on a different authority in time of war and in time of peace.

Arrangements with the British Government.

The agreement relating to naval defence between the governments of the Colonies and the government of the United Kingdom remained in force until 1903, when it was superseded by an agreement similar in effect, which was made between the government of the Commonwealth and the government of the United Kingdom, and which was ratified by the *Naval Agreement Act* 1903.

At the conference of 1909 an arrangement was made under which the Commonwealth, in place of the subsidy payable under the agreement of 1903, undertook to build and maintain an Australian fleet unit. In the following year the Commonwealth Parliament passed the *Naval Defence Act* 1910, and at the Imperial Conference of 1911 the Commonwealth Government submitted an official paper (cd. 5746—2) as to the building of the Australian navy. Arrangements were made with respect to the naval forces of the United Kingdom and of Canada and Australia, both of which had adopted the principle of separate navies, and the relations of their navies with the British Admiralty and with foreign powers were defined, though no formal agreement was actually drawn up. In 1912 the *Naval Agreement Act* 1903 was amended by the *Naval Agreement Act* 1912, under which the Governor-General was empowered to arrange with the Imperial Government for reducing the Naval Force to be provided on the Australian station under the agreement of 1903, and also for reducing the amount to be paid by the Commonwealth under that agreement, and in 1913 the Australian contribution ceased.

Military Service Referendums.

In the year 1916 a referendum was held on the 28th October, when the following question was submitted to the electors, as prescribed by section 5 of the *Military Service Referendum Act* 1916: "Are you in favour of the Government having, in this grave emergency, the same compulsory powers over citizens in regard to requiring their military service, for the term of this War, outside the Commonwealth, as it now has in regard to military service within the Commonwealth?" The voting was, in favour of the prescribed question, 1,087,557, and not in favour of the prescribed question, 1,160,033; and according to States, New South Wales, in favour, 356,805, against, 474,544; Victoria, in favour, 353,930, against 328,216; Queensland, in favour, 144,200; against, 158,051; South Australia, in favour, 87,924, against, 119,236; Western Australia, in favour, 94,069, against, 40,884; Tasmania, in favour, 48,493, against, 37,833; Federal Territories, in favour, 2,136, against, 1,269. The reference in the question to the compulsory powers of the government is to the powers conferred by the Defence Act, already quoted.

In the year 1917 a second referendum was taken under the provisions of the War Precautions (Military Service Referendum) Regulations of 1917, on the 20th December, when the following question was submitted to the electors: "Are you in favour of the proposal of the Commonwealth Government for re-inforcing the Australian Imperial Force oversea?" The voting was, for the whole of Australia, in favour of the prescribed question, 1,015,159, not in favour, 1,181,747; and in New South Wales, in favour, 341,256, against, 487,774; in Victoria, in favour, 329,772, against, 332,490; in Queensland, in favour, 132,771, against, 168,875; in South Australia, in favour, 86,663, against, 106,364; in Western Australia, in favour, 84,116, against, 46,522; in Tasmania, in favour, 38,881, against, 38,502; Federal Territories, in favour, 1,700, against, 1,220.

Suggestions were made before the Commission by Mr. H. C. Gibson, on behalf of the Australasian Council of Trade Unions, and by Mr. J. J. Kenneally, the Federal President of the Australian Labour Party, that the powers of the Commonwealth Parliament should be very considerably extended, but that it should be precluded by the Constitution from imposing conscription for military, naval or industrial purposes.

XII.—TAXATION.

The provisions of the Constitution.

The power of the Commonwealth Parliament to impose taxation is subject to certain restrictions, the objects of which are (*a*) to prevent discrimination between States or parts of States, or preference to one State or part of a State (s. 51 (ii); 99); (*b*) to guard the position of the Senate, in which the States have equal representation, by prescribing the manner in which taxation may be imposed by legislation (ss. 53, 55); and (*c*) to exempt property belonging to a State (s. 114). With regard to Customs duties there must not, apparently, be any discrimination based on locality, whether by reference to the boundaries of States or parts of States or otherwise (s. 90). Subject to these limitations, the Commonwealth Parliament has a general and unfettered power of taxation (s. 51 (ii)). As regards duties of customs and excise it has exclusive power (s. 90). As regards other taxation, the Commonwealth and State Parliaments have separate rather than concurrent powers; the Commonwealth may raise money by taxation for itself, and a State may raise money by taxation for itself, but the Commonwealth could not exclude a State from a field of taxation, though it might occupy the field by taking so much that there would be nothing left for a State (*see* the evidence of Sir Robert Garran, p. 66).

Taxes imposed by the Commonwealth.

Until 1910 the Commonwealth restricted its taxation to duties of customs and excise. In 1910 the Commonwealth imposed a land tax, in 1914 estate duties, in 1915 an income tax, in 1916 an entertainments tax, and in 1917 a war-time profits tax.

The judgments of the High Court.

An account of the cases in which the High Court has considered questions in regard to the taxing power of the Commonwealth is given in the evidence of Mr. R. Ewing, Commonwealth Commissioner of Land Tax and Commissioner of Taxation (pp. 150-157), where it is pointed out that, with the exception of *Cameron's* case (32 C.L.R. 68), the questions raised were in regard to section 55 of the Constitution.

Under the first paragraph of section 55 laws are to deal only with the imposition of taxation, and any provision therein dealing with any other matter is to be of no effect. Under the second paragraph of the section laws imposing taxation, except laws imposing duties of customs or excise, are to deal with one subject of taxation only. The section has not as yet been successfully invoked to invalidate any taxation enactment, although in one case (*Waterhouse's* case, 17 C.L.R. 665), in which section 36 (2) of the *Land Tax Assessment Act* 1910-1911 was held to be invalid on other grounds, Sir Samuel Griffith, *C.J.*, was prepared to hold that that provision was also invalid under section 55 of the Constitution.

The only cases in which provisions of taxation Acts or regulations have been held to be invalid are the following.—(1) *Sendall* v. *Federal Commissioner of Land Tax* (12 C.L.R. 664); (2) *Waterhouse* v. *Deputy Federal Commissioner of Taxation* (17

C.L.R. 665); (3) *Cameron* v. *Deputy Federal Commissioner of Taxation* (32 C.L.R. 68); and (4) *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (35 C.L.R. 422).

A list of the cases in which Acts imposing taxation have been challenged before the High Court, whether the attack succeeded or failed, is given in Appendix D, distinguishing between (1) cases where the attack was by reference to the first paragraph of section 55; (2) cases where it was by reference to the second paragraph of section 55; (3) cases where it was on the ground that section 51 (ii) prohibits discrimination between States or parts of States; and (4) cases where it was on the ground that the Commonwealth is forbidden by section 114 to impose any tax on State property.

Customs and Excise.

The extent of the power to impose duties of customs and of excise has not been clearly defined, but it may give the Commonwealth control over all indirect taxation imposed immediately or directly in respect of goods—*see* the judgment of Mr. Justice Rich in the *Petrol* case (38 C.L.R. at p. 437): "In my opinion, the Constitution gives exclusive power to the Commonwealth over all indirect taxation imposed immediately upon or in respect of goods, and does so by compressing every variety thereof under the term 'customs and excise'". The term excise has not received the same wide interpretation as in England, and has been held not to apply to brewers' licences of a fixed amount irrespective of the sales made by the brewer (*Peterswald* v. *Bartley,* 1 C.L.R. 497). It has been held to apply to a tax on the first sales of petrol, though the tax was imposed in the form of an additional tax on income, and to a tax on newspapers produced and sold within the State imposing the tax (*Commonwealth* v. *South Australia, Commonwealth Oil Refineries Ltd.* v. *South Australia*—the *Petrol* case, 38 C.L.R. 408; *John Fairfax and Sons Ltd.* v. *New South Wales, Smiths' Newspapers Ltd.* v. *New South Wales,* 39 C.L.R. 139).

The decision in the *Petrol* case as to the tax on motor spirit has caused States which desired to raise special taxes for the improvement of roads to resort to other methods of taxation. The State of South Australia has levied a motor tax calculated on weight plus power of vehicle, and it is claimed that this tax is neither so fair, nor so easy to collect, as the tax which was declared invalid. The State of Tasmania has levied a tax on retail instead of on wholesale dealers in motor spirit. The State of Western Australia, although its Act imposing a tax on motor spirit differed in some respects from that of South Australia, ceased to collect its tax after the delivery of the High Court judgment. The judgments of the High Court have thrown doubt on other taxes which have not been challenged, *e.g.,* a tax on coal, for the benefit of persons whose property has been injured through mining operations; a tax on swine sold, to compensate persons whose swine have been destroyed during an epidemic; duty or compensation fee levied on publicans and assessed on the quantity of liquor sold. It has been suggested that the only field of indirect taxation left solely to the States is stamp duties, and some doubt has been expressed as to the validity of some of the provisions in State Stamp Duties Acts (*see* the evidence of Mr. J. E. Clark, Assistant Crown Solicitor for the State of New South Wales, p. 1213).

Customs duties on goods imported by State Governments.

Customs duties imposed by the Commonwealth do not come within the prohibition in section 114 of the Constitution under which the Commonwealth is not to impose "any tax on any property of any kind belonging to a State" (*Attorney-General of New South Wales* v. *Collector of Customs*, 5 C.L.R. 818). Goods imported by a State for its own purposes are therefore subject to customs duties, and the proceeds of a State loan may go to increase the revenue of the Commonwealth. This liability has considerably increased the cost of development of the States, particularly in view of the increased prices of materials since the war, and it has been claimed that although duties may be remitted, remission has been refused, where Australian factories were too busy to carry out urgent orders of a State. Extracts from correspondence in 1924 between the Premier of Western Australia and the Prime Minister of the Commonwealth on this subject are set out in Appendix E.

It has not been possible to obtain exact details of the amounts paid in customs duties by the States, but it is said that large amounts were paid in connexion with the hydro-electric scheme in Tasmania, and with railway development in Western Australia, and that during the four years of the railway rehabilitation scheme in South Australia, after allowing for rebates, £600,000 was paid in customs duties.

Uniform Customs Duties. Rate in force when goods are entered for home consumption.

Customs duties are to be uniform throughout the Commonwealth, as "uniform" duties of customs were to be imposed within two years after the establishment of the Commonwealth, and the power of the Commonwealth Parliament to impose duties of customs and excise was to become exclusive on the imposition of "uniform" duties of customs (ss. 88 and 90 of the Constitution). It was urged before the Commission that where the tariff is increased between the date on which a vessel arrives at its first Australian port, and the date on which it subsequently arrives at another Australian port, the manner in which effect has been given in the *Customs Act* 1901-1925 to the principle of uniformity has inflicted a hardship on merchants landing goods in those ports, such as Hobart or Brisbane, which are, or may be, the last port of call of oversea vessels. Under section 132 of that Act all import duties are to be paid at the rate in force when the goods are entered for home consumption. If, for instance, the tariff is increased between the arrival of a vessel at Fremantle and its arrival at Brisbane, lower duties are paid on goods landed at Fremantle and entered there for home consumption than on goods landed at Brisbane and entered there for home consumption.

Resolutions on this subject have on several occasions been presented by the Associated Chambers of Commerce, including the following resolution, which is set out in Exhibit 62 (evidence p. 1483) :—

> "That it be a recommendation to the Commonwealth Government that the Customs Act be amended to provide that, as soon as an overseas vessel has reported to the Customs at its first port of

call in the Commonwealth, the rate of duty leviable on that date shall be the legal rate for the whole of that vessel's cargo if entered for home consumption, and that the Customs Act be amended accordingly."

The claim is, in effect, that once a vessel is entered at an Australian port the rate of duty on goods imported in that vessel should be the same wherever those goods are landed. Under the present system an importer of goods at one port of call may pay a less rate than an importer at a later port, and may possibly be able to undersell the later importer by transferring his goods from one State to another. Section 132 of the Customs Act makes administration simple, and while it may be practicable to amend it without creating any serious difficulties, care will be needed not to infringe the requirements as to uniformity, and after such an amendment it might happen that there would be similar goods in different ships in port cleared on the same day, paying different rates of duty.

Indirect use of the Excise Power.

The *Excise Tariff* 1906 (No. 16 of 1906) provided that duties of excise should on and from the 1st January, 1907, be imposed on the dutiable goods specified in a schedule to the Act at the rates specified in the schedule, but contained a proviso "that this Act shall not apply to goods manufactured by any person in any part of the Commonwealth under conditions as to remuneration of labour which (*a*) are declared by a resolution of both Houses of Parliament to be fair and reasonable; or (*b*) are in accordance with an industrial award under the *Commonwealth Conciliation and Arbitration Act* 1904; or (*c*) are in accordance with the terms of an industrial agreement filed under the *Commonwealth Conciliation and Arbitration Act* 1904; or (*d*) are, on an application made for the purpose to the President of the Commonwealth Court of Conciliation and Arbitration, declared to be fair and reasonable by him or by a Judge of the Supreme Court of a State or any person or persons who compose a State industrial authority to whom he may refer the matter" (s. 2). An account of this attempt to regulate conditions of manufacture of the agricultural implements specified in the Act by an indirect use of the power to impose duties of excise is given in the evidence of Mr. E. T. Hall, Comptroller-General of Customs (pp. 382-383):—

"With the object of furthering its declared policy the second Deakin administration passed in 1906 an Excise Tariff Act which imposed certain duties on certain types of agricultural machinery. This Act was assented to on 12th October, 1906, and on the same day assent was given to a Customs Tariff Act which revised the duties on similar types of agricultural machinery imported. Under the *Customs Tariff Act* 1906, power was given to the Governor-General to reduce the rate of import duty set out in the schedule to the Act in respect of stripper harvesters, if he was satisfied that the cash prices at which stripper harvesters and drills manufactured in Australia were sold exceeded prices specified in the Act, but so that the reduction should not reduce the rate of duty below one-half the rate of duty imposed by the Act. The whole of the *Customs Tariff Act* 1906 (No. 14 of 1906) was repealed by the *Customs Tariff Act* 1908, assented to on 3rd June, 1908.

The rates of excise duty imposed under the *Excise Tariff Act* 1906 on locally manufactured agricultural machinery of certain types were 37½ per cent. of those imposed by the *Customs Tariff Act* 1906 on agricultural machinery of identical types imported prior to 7th September, 1906, and 50 per cent. of the rate imposed on those imported after that date. The legality of the Act was questioned by certain Australian manufacturers, and the leading case of *The King and the Minister of State for the Commonwealth administering the Customs* (plaintiffs) v. *Barger* (defendant), and the *Commonwealth and A. W. Smart, Collector of Customs* (plaintiffs) v. *McKay* (defendants) was contested in the High Court of Australia.

The circumstances giving rise to the action were as follow:—An action was brought by His Majesty the King, and the Minister of State for the Commonwealth administering the Customs against William Gabriel Barger, wherein the statement of claim alleged that the defendant, a manufacturer of agricultural implements, on the 8th, 9th and 10th January, 1908, manufactured in Melbourne certain specified implements, being "stump-jump ploughs" and "cultivators—other than disc cultivators", that such implements were dutiable goods specified in the schedule to the *Excise Tariff Act* 1906 (No. 16), and were not manufactured under any of the conditions as to remuneration of labour specified in the proviso to section 2 of the Act; that the implements were not manufactured pursuant to the provisions of the *Excise Act* 1901; and that defendants manufactured the implements specified without having obtained a licence to manufacture from the Collector of Customs pursuant to the *Excise Act* 1901 and without having a licence to manufacture in force in any State on the days mentioned or at all. The plaintiffs jointly and severally claimed a penalty in respect of each of the implements specified. The defendant demurred to the whole of the statement of claim, and the demurrer was set down for hearing before the Full Court, the question being whether the *Excise Tariff Act* 1906 (No. 16) was valid.

Another action was brought by the *Commonwealth and Archibald William Smart, Collector of Customs for the State of Victoria, for and on behalf of the Commonwealth*, against *H. V. McKay*, and in the statement of claim it was alleged that the defendant, a manufacturer of agricultural implements, had on and between 1st January, 1907, and 8th November, 1907, manufactured certain stripper harvesters of which defendant was the owner, and that all the implements were dutiable goods specified in the schedule to the *Excise Tariff Act* 1906 (No. 16), and were not manufactured under any of the conditions as to the remuneration of labour specified in the proviso to section 2 of that Act; and that the defendant had not paid the duties of excise imposed in respect of such implements by the *Excise Tariff Act* 1906 (No. 16), and still refused to do so. The plaintiffs jointly and severally claimed £20,000, the amount of the excise duties payable in respect of such implements. The defendant demurred to the whole of the statement of claim, and the demurrer was set down for hearing before the Full Court, the question being the same as in the first-mentioned action. Both the demurrers were heard together. The State of Victoria obtained leave to intervene in both cases.

The High Court of Australia in announcing its decision that the *Excise Tariff Act* 1906 (No. 16) was *ultra vires* the Constitution stated that the Act (i) was not an Act imposing duties of excise, but was an Act to regulate the conditions of manufacture of agricultural implements, and was therefore not an exercise of the power of taxation conferred by the Constitution; (ii) was invalid as dealing with matters other than duties of excise contrary to section 55 of the Constitution; (iii) was invalid on the ground that it authorized discrimination, and therefore discriminated between States or parts of States within the meaning of section 51 (ii) of the Constitution, and authorized the giving, and therefore gave preference to one State or a part thereof within the meaning of section 99 of the Constitution."

The position of the States.

The effect of the exclusion of the States from the field of excise has already been mentioned. Commonwealth legislation has had some indirect effect on State taxation besides reducing the taxable capacity of the people. The Commonwealth Parliament has legislated so as to make the interest on State loans liable for Federal income tax. By section 4 of the *Taxation of Loans Act* 1923 the interest on Commonwealth loans is to be liable to State income tax, but this section is not to commence until a date to be fixed by proclamation, and no proclamation has yet been issued. Prior to the passing of that Act it was beyond the power of the States to tax Commonwealth loans, and where the Commonwealth Parliament, in the exercise of its power to make laws with respect to borrowing money on the public credit of the Commonwealth, had issued loans free of State tax, a State could not legislate so as to include the interest on a Commonwealth loan in the income of a tax-payer for the purpose of fixing the rate of tax payable by him to the State (*The Commonwealth* v. *Commissioner of Income Tax, Queensland,* 29 C.L.R. 1). The States were unable to tax servants of the Commonwealth until the *Commonwealth Salaries Act* 1907, under which a State may tax the salaries of officers of the Commonwealth residing in the State, earned in the State, provided that the taxation is not at a higher rate or to a greater extent than is imposed on other salaries of the same amount earned in the State (*Chaplin* v. *Commissioner of Taxes for South Australia,* 12 C.L.R. 375; the *Engineers'* case, 28 C.L.R. at p. 157). Commonwealth property is not liable to State taxation or to municipal rates (s. 114 of the Constitution; *Municipal Council of Sydney* v. *Commonwealth,* 1 C.L.R. 208), but in practice it is usual for the Commonwealth to make allowances, regarding its payments as a return for services rendered (evidence, p. 109). It was said that in some circumstances land held by the Commonwealth for soldiers' homes was unrateable, and that rates are not paid (evidence, p. 651).

Residents of another State. Double Taxation.

A State is prevented from taxing a resident of another State at a higher rate than it taxes its own residents, but the provision of the Constitution which deals with the matter has only a limited operation, as apparently "it is discrimination on the sole ground of residence outside the legislating State the Constitution aims at in section 117" (*Davies and Jones* v. *Western Australia,* 2 C.L.R. at p. 47).

The Constitution does not prevent an Australian taxpayer from being liable to taxation by two or more States in respect of the same asset. Instances of this double taxation are given at pages 1518-1519 of the evidence:—

"The anomalies which result from the States levying taxes both on the basis of the situation of the asset and on the basis of domicile can be seen from the following remarks of the Chairman of Directors of Bagot's Executor and Trustee Company Limited, Adelaide (Honorable W. G. Duncan), published in the Adelaide *Advertiser* and *Register* on 21st May, 1924, extracts from which are as follows:—

'Under the existing law, if the estate of a testator having died domiciled in this State, possesses shares on, say, the Melbourne register of a company, which also has a share register in Sydney, the executor is liable to pay South Australian succession duty and Victorian and New South Wales probate duties, and if the company possesses assets in Queensland, then the executor is required to also pay Queensland probate duty, calculated on the value of the deceased's share (as a shareholder) in such assets. Added to these duties is Federal estate duty, if the net value of the estate exceeds £1,000, making altogether five different duties. Added to this is the expense and unavoidable delay in re-sealing in some of the States—a process that often takes weeks, and in some cases months to finalize, thus preventing the executor from promptly dealing with the particular asset or assets involved.

To quote an actual case:—My company is an executor of the estate of a deceased person who died in 1923. Amongst the deceased's assets were shares on the Melbourne register of a well-known limited company, whose head office is in Sydney. Among the assets of this limited company are some situate in Queensland. In the first instance, the deceased being domiciled in South Australia, my company had to pay (1) South Australian succession duty; then (2) Victorian duty, because the shares were on the Melbourne register of the limited company; then (3) New South Wales probate duty because of section 103 of the New South Wales Stamp Duty Act, which reads, *inter alia*, as follows:—'The estate of a deceased person, whether domiciled at the time of his death in or out of New South Wales, shall also be deemed to include (*c*) every share held by such person in any corporation, company or society having a share register in New South Wales for any purpose whatsoever; then (4) Queensland probate duty calculated on the deceased's share (as a shareholder) in the assets situate in Queensland of the limited company—this particular duty is payable by the executor to the limited company acting on behalf of the Queensland Government—that is, that Government makes the limited company its collecting agent; then (5) Commonwealth estate duty (the net value of the estate being over £1,000)'.

In another instance brought before the Taxpayers' Association of Queensland—an estate administered by the Public Trustee of New South Wales, where the estate included 1,160 shares in a large

public company, valued at £2,291—the shares were assessed as assets for New South Wales probate duty at full value under the Stamp (Death Duties) Act, being shares in a company incorporated outside of New South Wales, and carrying on pastoral pursuits in that State. They were also assessed as assets in Victoria at full value, being on the share register in that State, and in Queensland under the Succession and Probate Duties Act at £426, being a proportion based on the relation Queensland assets of the company bore to total assets. Thus shares worth £2,291 were, in fact, taxed as if they were assets valued at £5,008. In addition, Commonwealth estate duty would, of course, be payable also."

Other instances might be cited, arising from the duties payable on partnership assets.

The question of double taxation was discussed by a Premiers' Conference held in 1924 and referred to a committee of State taxation officials, who unanimously passed the following resolutions (evidence, p. 1561) :—

> "That in the opinion of this conference a satisfactory solution for the cessation of double death duties upon shares in companies held by deceased persons at the date of death would be for each State, irrespective of domicile of deceased, to refrain from directly levying duty on shareholdings where the registers of such companies are situated in their State, and to levy on shareholdings only in the State where the companies' works or business is actually carried on.
>
> In the event of the works or business of the company being actually carried on in more than one State, duty should be levied in such States upon the proportion which the assets in such State bear to the total assets of the company wheresoever situated".

The views expressed in these resolutions, however, have not been universally accepted. The following alternative was proposed by Mr. Fitzpatrick, Commissioner of Stamp Duties for the State of Queensland (evidence, p. 1562) :—

> "*Shares in Companies.—Basis of settlement of this double taxation question, which, if adopted, would fairly meet the position.*
>
> (*a*) Where a person died domiciled in Queensland possessed of shares in a company incorporated in and carrying on business solely in the United Kingdom, or incorporated in and carrying on business solely in any of the States of the Commonwealth other than Queensland, or such company is carrying on business in the United Kingdom and one or other of the States of the Commonwealth other than Queensland, the whole of the succession duty paid elsewhere in respect of such shares to be allowed as a deduction against the duty assessed in Queensland in respect of such shares.
>
> (*b*) Where a person died domiciled in the United Kingdom, or died domiciled in any one of the States of the Commonwealth possessed of shares in a company incorporated in Queensland and carrying on business in that State and having all its assets in Queensland, then irrespective of the domicile of the person so dying, or the locality of the share register upon which such shares are recorded, the total value of such shares to be chargeable with duty in Queensland, and such duty to be allowed as a deduction against the duty payable, if any, where such person died domiciled.

(*c*) Where a company incorporated in Queensland, and having assets in Queensland, is carrying on business outside Queensland and has assets outside Queensland, duty shall be paid in Queensland on the death of a shareholder in such company upon the value of the shares so held, irrespective of the domicile of the deceased shareholder, or of the share register upon which such shares are recorded in the proportion that the value of the assets of the company in Queensland bears to the total value of the assets of the company. Provided, however, if such company has assets in any place where this basis of reciprocity is not applicable in the place of domicile, and if there are no assets of the company in the place of domicile, then such assets shall be included with the assets in the place where the head office of the company is situate or such company is incorporated.

In regard to the assets of such Queensland company situate outside Queensland, duty shall also be payable where such assets are situate upon the value of the shares in the proportion that the value of such assets bears to the total value of the assets of the company.

(*d*) Where a company incorporated outside Queensland is carrying on business in Queensland and elsewhere, duty shall be paid on the death of a shareholder in such company upon the value of the shares so held, irrespective of the domicile of the deceased shareholder or where the head office or share register of the company is situate, in the proportion that the value of the assets of the company in Queensland bears to the total value of the assets of the company wheresoever situate. Similarly duty shall be collected in the United Kingdom or other State of the Commonwealth on the value of the shares held by the deceased member in the proportion that the value of the assets of the company in any such place bears to the total value of the assets of the company.

Provided, however, where such company is carrying on business and has assets in any country or place other than the United Kingdom or States of the Commonwealth where this basis of reciprocity has been agreed upon, and the deceased member in such company died domiciled either in the United Kingdom or in one or other of the States of the Commonwealth (where reciprocity has been agreed upon), there shall be added to the value of the assets situate in such country or place where the deceased member was domiciled, the value of the assets of the company situate elsewhere than in the United Kingdom or States of the Commonwealth where reciprocity as aforesaid has been agreed upon, and duty be paid in such country or place of domicile as aforesaid on the value of the shares or other interests in the proportion that the value of the assets as so ascertained bears to the total value of the assets of the company.

(*e*) In the case of a company incorporated within or without Queensland, and such company's principal business is pastoral, agricultural production, mining, or timber getting (primary industry), all moneys in bank or other liquid or movable assets shall follow proportionately the destination of the 'primary assets' of the company.

(*f*) Provided that if this basis of assessment of shares in companies is adopted, the maxim *mobilia sequuntur personam* in so far as shares in companies are affected by this basis of reciprocity, shall be modified accordingly.

(*g*) The matter of the collection of the duty on this basis should be quite a simple matter and easily adjustable between the parties to any arrangement on the above basis."

Probate and Letters of Administration.

The Commonwealth has no power to regulate the grant of probate or letters of administration, and Federal estate duty is not properly described as a testamentary expense (*Shelley* v. *New South Wales Institution for Deaf, Dumb and Blind,* 1919 A.C. 650).

Where an executor or administrator obtains a grant of probate or letters of administration in one State, he cannot deal with assets in another State, unless he obtains the necessary authority under the law of that State by re-sealing or by another grant. Resolutions in favour of a provision for a single probate for the whole Commonwealth have been passed by the Associated Chambers of Commerce from time to time (evidence, p. 1496). It was thought by witnesses (evidence, pp. 899, 1045-1046, 1255-1256, 1562) that there would be no practical or administrative difficulties involved in the grant of a single probate, though there would be a slight loss in revenue to the States.

XIII.—APPROPRIATION.

The only constitutional limitations on the power of the Commonwealth Parliament to appropriate the Commonwealth Revenue Fund are those which are mentioned or referred to in s. 81. The Commonwealth Parliament cannot disregard the charges and liabilities imposed by the Constitution, or the obligations of the Commonwealth under the Financial Agreement of the 12th December, 1927, but subject to these charges liabilities and obligations it may appropriate any part of the Fund "for the purposes of the Commonwealth." The important question is whether, and if so how far, these words limit the power of appropriation.

"Unquestionably the Commonwealth may appropriate money for the maintenance of its government and for the execution of any of the objects which have been committed to any branch of it. Does the power of appropriation extend beyond this, so that the Parliament having a general power of taxation, has an equally general power to expend the proceeds of that taxation as it thinks fit without regard to whether the object of expenditure is for the purpose of and incident to some matter which belongs to the Federal Government?" (*Harrison Moore,* 2nd edn., p. 523). The answer to the question may make a number of appropriations liable to be examined by the High Court, or it may allow the Commonwealth Government to trench upon the functions of the States, and at the same time affect the possibility of there being any surplus revenue for distribution among the States.

The difficulties of the problem were present to the minds of the framers of the Constitution. In the Convention of 1891 a fear was expressed on the one hand that the Treasurer of the Commonwealth might have to consult the law officers of the Crown on every item of the estimates, and on the other that the Commonwealth Parliament might, by the expenditure of money for purposes outside its sphere, encroach upon the sphere of the States. Sir Samuel Griffith, who had previously thought that some amendment was necessary to guard against the latter possibility, told the Convention that he had been thinking about the matter for several months and had come to the conclusion that the clause, in the form in which it then stood, contained "all the limitations that we can really insert, however many words we may use to express them" (Convention Debates, Sydney, 1891, pp. 788-789). At that time the Consolidated Revenue Fund was to be appropriated for "the public service" of the Commonwealth. In the Convention of 1898 Mr. Isaacs, now Sir Isaac Isaacs, pointed out that some of the proposals in the Finance Committee's report were to the effect that a portion of the Consolidated Revenue Fund was not to go to the public services of the Commonwealth, but to be returned to the States, and suggested that the words "public service of the Commonwealth" were not sufficiently large to cover the proposed return to the States. Apparently as the result of his suggestion the word "purposes" was substituted as a drafting amendment for "public service" (Convention Debates, Melbourne, 1898, pp. 899-900).

In its present form the section is capable of more than one interpretation. The section is discussed in the evidence given before the Commission by Sir Robert Garran, Sir Edward Mitchell, and Mr. Owen Dixon, now Mr. Justice Dixon, the last named submitting a

memorandum which had been prepared by a sub-committee on behalf of the Committee of Counsel of Victoria. These witnesses differed as to the true interpretation of the section, the most important divergence of view being that Sir Robert Garran treated the section as containing a power of appropriation which is not confined to subject-matters within the specific legislative powers of the Federal Parliament (evidence, p. 1721), and that Sir Edward Mitchell and Mr. Owen Dixon treated the section as limiting the objects of appropriation (evidence, pp. 760-761, 780).

Sir Robert Garran's view is that the Commonwealth, in the sense in which the term is used in the phrase "for the purposes of the Commonwealth," includes the States and not merely the central government, and that the Commonwealth Parliament may appropriate for any purpose which it considers to be a purpose of the Commonwealth. Even if the power of appropriation is not unlimited, the purpose of an appropriation is, in his view, a political question on which the Court would not interfere, unless it could be satisfied that the purpose was one which could, by no conceivable means, have any interest for the Commonwealth *qua* Commonwealth, or have any relation to any of the powers given to the Commonwealth by the Constitution (evidence, pp. 69-73).

In Sir Edward Mitchell's view the power of appropriation is limited, "the purposes of the Commonwealth" including not merely everything about which the Commonwealth Parliament may legislate, but also everything which the Executive Government may do without express legislative authority. At the same time there would, in his view, be a practical difficulty in the way of any attempt to test the validity of an ordinary Appropriation Act in a court of law.

> "There is a good deal of difficulty in saying what is the meaning of the words 'purposes of the Commonwealth'. No doubt these are words of limitation, and some meaning must be given to them. You cannot deal with the disposal of the revenues or moneys raised or received by the Executive just as though no such words existed, simply because the Federal legislature determined that they should be disposed of in a certain way. I think there would be great practical difficulty when the Federal Parliament simply passes an ordinary Appropriation Act, in which moneys are specifically voted for a certain purpose, to find a competent plaintiff having a valid *locus standi* to sustain a complaint in a court of law. I have no doubt that "the purposes of the Commonwealth" include everything as to which the Parliament can legislate, and I think they also include everything in regard to which the Executive Government of the Commonwealth can lawfully do" (evidence, pp. 760-761).

In Mr. Owen Dixon's view the power of the Commonwealth Parliament to appropriate money is restricted to the subjects assigned to the Federal legislative power (evidence, p. 780).

In America, although appropriations in aid of purposes outside the enumerated subjects of legislative power have been common since the first Congress, no appropriation by Congress has ever been held bad. Congress appears to have acted consistently on the view that Federal expenditure is not restricted to those subjects, and several eminent publicists regard the doctrine, that Congress may appropriate

money in aid of matters which the Federal Government of the United States is not constitutionally able to administer and regulate, as being now established (*cf. Willoughby,* Constitutional Law of the United States, vol. 1, p. 588; and *Hare,* American Constitutional Law, vol. 1, p. 245).

Sir Robert Garran regards this doctrine as being in effect applicable to appropriations by the Commonwealth Parliament, notwithstanding some differences between the Australian and American Constitutions, including the words under which Congress may provide "for the welfare of the United States," and the words under which the Consolidated Revenue Fund of the Commonwealth is to be appropriated by the Commonwealth Parliament "for the purposes of the Commonwealth", and he cited a number of American cases in which the validity of appropriations by Congress had been unsuccessfully called in question, among them being the case of *Massachusetts* v. *Mellon* (262 U.S. 447), which was concerned with money appropriated by Congress to the States for the purpose of reducing maternal and infant mortality and of protecting the health of mothers and infants, and in which it was held, in 1923, that questions raised by a State as to the right of the Treasury to disburse the money was not justiciable (evidence, pp. 70-71). Mr. Owen Dixon's view is indicated at p. 780 of the evidence—

> "The High Court would no doubt give great weight to this doctrine, if it were supported by decisions of the United States Supreme Court, or had obtained universal acceptance. But the fact appears to be that American theory was opposed to it, but was first disregarded and then overthrown by Congressional practice. Moreover, the structure of the Australian Constitution and the terms in which the relevant provisions are expressed differ materially from those of the United States."

In connexion with the question whether the Commonwealth Parliament could, if it so desired, legislate for the establishment of a system of child endowment, opinions which dealt, among other matters, with the scope and operation of section 81, were obtained by the Royal Commission on Child Endowment from Sir Robert Garran, Sir Edward Mitchell, Mr. Owen Dixon, and Mr. Maurice Blackburn. From the summary at pp. 10-15 of the report of that Commission (15th December, 1928), it would seem that Mr. Blackburn did not regard the Commonwealth Parliament as having an absolute power of appropriation for such purposes as it deems proper, but that if the Parliament voted money for some purpose not within its legislative competence nor authorized by the Constitution, the appropriation could only be assailed by a State, and on the ground that the money was "surplus revenue" within the meaning of section 94 of the Constitution.

Several methods by which the question might possibly be raised before an appropriate Court are briefly discussed or indicated in the evidence given before this Commission (pp. 790-791) and in the report of the Royal Commission on Child Endowment (pp. 10-15). Mr. Owen Dixon was of opinion that the Attorney-General for the Commonwealth could raise the question by a suit in the High Court, or could give his *fiat* to enable a litigant to do so in the name of the Attorney-General (evidence p. 790). Other possible methods referred to by Sir Edward

Mitchell, Mr. Owen Dixon or Mr. Blackburn were (*a*) by proceedings against an officer who paid out money, if the Act under which he did so were invalid; and (*b*) where an Act sought to safeguard the administration of money by imposing a penalty in cases of improper receipt, and some person was prosecuted for a contravention of the Act, by a defence that the provisions of the Act, or at least those of its provisions which imposed the penalty, were *ultra vires*. At the same time Mr. Owen Dixon pointed out that the problem of procedure has not yet been fully investigated and has not been solved (evidence, p. 790).

The question was raised in Parliament in 1903, in the debate on the Naval Agreement Bill, by Mr. Higgins, afterwards Mr. Justice Higgins, who expressed grave doubts as to the correctness of the view that section 81 gives the Commonwealth Parliament an unqualified power of appropriation (*Parliamentary Debates,* 1903, pp. 1997-1998).

In a memorandum presented to Parliament in 1908, the Honorable L. E. Groom, now Sir Littleton Groom, who was then Attorney-General, discussed the appropriation power in connexion with a proposal for the establishment of an Australian Bureau of Agriculture, and after referring to the American precedents expressed the opinion that "as regards the Commonwealth power of appropriation the words are in terms as general as those contained in the United States Constitution, and are accompanied by no specific words of limitation, the only condition being that the appropriation must be 'for the purposes of the Commonwealth'." At the same time he expressed the opinion that the power to organize such a department might be incidental to various specific powers under the Constitution—for instance, interstate commerce, statistics, foreign trade and quarantine (*Parliamentary Papers,* 1907-8, p. 1151).

In practice the Commonwealth Parliament has, it is said, always acted on the assumption that section 81 gives it an absolute power of appropriation for general purposes (evidence of Sir Robert Garran, p. 69).

XIV.—TRADE AND COMMERCE. FREEDOM OF TRADE, COMMERCE AND INTERCOURSE AMONG THE STATES.

Trade and Commerce.

The provisions of the Constitution.

The power of the Commonwealth Parliament to make laws with respect to trade and commerce is defined by sections 51 (i) and 99 in general terms, and in particular terms by the provisions of section 51 relating to bills of exchange, weights and measures, patents, trade-marks, and corporations, which in effect enlarge the trade and commerce power and authorize legislation with respect to trade and commerce within a State, so far as those matters are concerned. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State (s. 98).

Under section 51 (i) the Parliament of the Commonwealth may make laws with respect to trade and commerce with other countries and among the States, but this power is subject to the requirements, in section 99, that the Commonwealth shall not by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof. The Commonwealth has no power to make laws with respect to trade and commerce within a State, except in so far as it is specifically authorized. It cannot, therefore, pass a uniform Sale of Goods Act or Partnership Act, nor can it inquire into the working of a corporation carrying on business within a State. It may regulate routes that may be used for interstate commerce, and thus control airways, but it cannot control aviation within a State. The Commonwealth cannot carry out a marketing scheme under which it could fix both the quotas of a commodity which may be consumed within a State, and the quotas which may be used in interstate trade or in export overseas. To carry out any marketing scheme of this character the Commonwealth must depend on the co-operation of the States, but is entitled itself to pass laws dealing with export overseas, or interstate traffic. The Commonwealth has acted on this power with regard to export trade in relation to a number of commodities, and by the *Inter-State Dried Fruits Act* 1928 it has legislated in order to regulate trade between States, after portions of State Acts passed with this object had been declared invalid.

The manner in which the limitation of the Commonwealth's powers has hindered a majority in the Commonwealth Parliament for the time being may be gathered from the proposals made to alter the Constitution with relation to trade and commerce and monopolies, put before the people and rejected in 1911 and 1913. The referendums of 1913 included a proposed law for an alteration relating to trusts and combines. Similar proposals were put forward in 1919. Speeches made in Parliament in relation to these proposals are quoted in the evidence of Mr. J. J. Kenneally (pp. 1101-1113).

The powers of the Commonwealth Parliament with respect to trade and commerce are similar to those of the Congress of the United States, but as the States of the Commonwealth are, on the average, larger than those of the United States and have their own coastlines, and as

much of the trade and commerce of Australia in manufactured goods is in the capital cities of the States, which are large centres of population, and between the capital city and the rest of a State, the powers of the Commonwealth Parliament are in fact more restricted in this respect than those of Congress. In the United States it has proved in some instances so difficult to draw a distinction between interstate and intra-state commerce that Federal legislation has superseded that of the States. This condition is not so likely to prevail in Australia, and has become less likely as the concentration of the population in the great cities of New South Wales, Victoria, and South Australia has increased.

The restriction in section 99, on the power conferred in section 51 (i), that a law relating to trade and commerce must not give preference to one State or any part thereof, is similar to that contained in section 51 (ii) relating to taxation, and in section 51 (iii) relating to bounties. These restrictions do not prevent the Commonwealth conferring a benefit on one State or part of a State which is not enjoyed by another State or part of a State. A bounty on cotton would not be unconstitutional because the greater part of the cotton produced in Australia is grown in Queensland, and similarly the amendment of the *Navigation Act* by the Act No. 8 of 1926, which in general terms permits unlicensed vessels to engage in inter-state traffic, where it is shown to the satisfaction of the Governor-General that tourist traffic is injured or retarded, is not an infringement of section 99, merely because the State of Tasmania depends more than any other State on tourist traffic by sea. The restrictions are aimed at distinctions which are based on locality so that the Commonwealth Parliament may not give preference to a State as a State, or to a part of a State because it is part of the State named. It is said in *Barger's* case that the provision in section 51 (ii) under which the Parliament is not to "discriminate between States" and the provision in section 99 under which the Commonwealth is not to "give preference to one State over another State" seem to be identical in purport and effect, that "discriminate between parts of States" may or may not be identical with "give preference to any part" of one State "over any other part" of another State, but that "the treatment that is forbidden, discrimination or preference, is in relation to the localities considered as parts of States, and not as mere Australian localities, or parts of the Commonwealth considered as a single country" (6 C.L.R., at p. 107; *cf., Cameron's case,* 32 C.L.R., at pp. 72, 76, 78, 79).

Matters within the trade and commerce power.

In section 51 (i) the terms are "trade and commerce with other countries and among the States", and in section 92 "trade commerce and intercourse among the States", intercourse including non-commercial intercourse (*Smithers'* case, 16 C.L.R. at p. 113). The meaning of the terms is discussed in *McArthur's* case (28 C.L.R. at pp. 546-549):—

> "The terms 'trade, commerce, and intercourse' are not terms of art. They are expressions of fact, they are terms of common knowledge as well known to laymen as to lawyers, and better understood in detail by traders and commercial men than by Judges. . . . The particular instances that may fall within the ambit of the expressions depend upon the varying phases and development of

trade, commerce and intercourse itself. Aviation and wireless telephony have lately added to the list of instances, but the essential character of the class remains the same. 'Trade and commerce' between different countries—we leave out for the present the word 'intercourse'—has never been confined to the mere act of transportation of merchandise over the frontier. That the words include that act is, of course, a truism. But that they go far beyond it is a fact quite as undoubted. All the commercial arrangements of which transportation is the direct and necessary result form part of 'trade and commerce'. The mutual communings, the negotiations verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations which the world calls 'trade and commerce'. . . . In *Welton* v. *Missouri* [91 U.S. 275, at p. 280] Field, *J.*, speaking for the Court said: 'Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of one country and the citizens or subjects of other countries, and between the citizens of different States.' In the very recent case of *Public Utilities Commission* v. *London* [249 U.S. 236, at p. 245] the Court said: 'Inter-state commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods.'

It is therefore impossible to limit the 'trade and commerce' either 'among the States' or 'with other countries' to the mere act of transportation over the territorial frontier. The notion of a person or a thing, tangible or intangible, moving in some way from one State to another is no doubt a necessary part of the concept of 'trade, commerce, and intercourse among the States'. But all the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, continue and effectuate the movement of persons and things from State to State are also parts of the concept, because they are essential for accomplishing the acknowledged end. Commercial transactions are multiform, and each transaction that is said to be inter-state must be judged of by its substantial nature in order to ascertain whether and how far it is or is not of the character predicated. A given transaction which taken by itself would be domestic, as, for instance, transport between two points within a State, may in a particular instance be of an inter-state nature by reason of its association as part of a larger integer, having as a whole the distinctive character of commerce between States. On the other hand, a transaction which is inherently of an inter-state character, as passage of goods between two States, is none the less inter-state because a contract out of which it arises is itself a domestic contract. The mode of fulfilment of the contract may be optional, one mode being intra-state and the other (the one assumedly adopted) being by inter-state movement, and in that case the inter-state movement remains inter-state whatever the impelling motive may be. The meaning of the expression 'trade and commerce among the States' must be the same, in sec. 51 (i) and sec. 92, and in both must embrace all that is ordinarily comprised within the term 'trade and commerce' when taking place 'among the States'."

Some of the matters which come within the trade and commerce power are indicated in the above extract from the judgment of the Chief Justice, Sir Adrian Knox, and two other Justices, Sir Isaac Isaacs and Mr. Justice Starke, in *McArthur's* case, and it has been said or decided in other cases that various matters come within the power, though the High Court has not attempted to make an exhaustive list. The power extends to the transport of goods or persons by land, sea or air as well as to the purchase or sale of commodities, and under this power, with the aid of section 98, the Commonwealth Parliament may legislate with respect to ships, vehicles, or other agencies or means used in the trade or commerce, contractual rights and obligations, and the relations of employers and employees (*cf. Australian Steamships Limited* v. *Malcolm*, 19 C.L.R. 298). In the *Railway Servants* case (4 C.L.R. at p. 540) it is said that "the power to regulate inter-state trade and commerce, which is involved in the language of sec. 51 (i), is plenary as to its objects, and includes a power to prescribe in every respect the rules by which such commerce is to be governed"—a view which derives support from the principles laid down in the *Engineers'* case (28 C.L.R. 129).

In exercise of the trade and commerce power the Commonwealth Parliament has legislated on a variety of subjects, including monopolies and agreements in restraint of trade, carriage of goods by sea, compensation to seamen for injuries suffered in the course of their employment, and licensing of waterside workers (*Australian Industries Preservation Act* 1906-1910, *Sea-Carriage of Goods Act* 1924, *Seamen's Compensation Act* 1911, and *Transport Workers Act* 1928-1929).

Where inter-state trade and commerce begin and end.

It is not possible to lay down any hard and fast rule which can be applied in a merely mechanical way in order to determine whether a particular transaction is to be regarded as taking place before inter-state commerce begins or after inter-state commerce ends. The question is not whether from a technical point of view the transaction, considered alone and without reference to its association with other circumstances, is an intra-state matter, but whether from a business point of view it is so connected with other circumstances that it is a part of inter-state commerce (*cf. Petrol* case, 38 C.L.R. at pp. 427-430).

In general, goods do not cease to be the subjects of inter-state commerce until they have been taken from their original packages and mingled with the other goods in the State, though the "original package" doctrine is rather a convenient working rule than a definite legal test (*Petrol* case, 38 C.L.R. at p. 428).

Trade and commerce with other countries.

The power to make laws with respect to trade and commerce with other countries was exercised in the first period of the Commonwealth's history through the Customs Act and a number of other Acts with various objects, including the *Sea-Carriage of Goods Act* 1904, the *Commerce (Trade Descriptions) Act* 1905, and the *Australian Industries Preservation Act* 1906-1910. More recently it has been exercised through a number of Acts intended to promote the marketing of primary products overseas, such as the *Dairy Produce Export Control Act* 1924, the *Dried Fruits Export Control Act* 1924, and the *Export Guarantee Act* 1924-1925, as well as by Customs legislation.

Administration of Acts to promote the marketing of primary products overseas.

Under the *Customs Act* 1901-1925 (s. 270) regulations may be made prescribing amongst other things (*a*) the nature, size, and material of the packages in which goods for export are to be packed; (*b*) the maximum or minimum weight or quantity of goods for export which may be contained in any one package; (*c*) the conditions of preparation or manufacture for export of any articles used for food or drink by man; and (*d*) the conditions as to purity, soundness and freedom from disease of goods for export. The manner in which the regulations made under this power, and the Acts with respect to marketing primary products overseas, are administered is described in the evidence of Mr. Carroll, Commonwealth Supervisor of Dairy Produce, with relation to grading (p. 425), and Mr. Allen, Chief Veterinary Officer of the Commonwealth, with relation to inspection of certain goods for export (p. 670). The manner in which the Acts dealing with the export of fruit are administered is described in the evidence of Mr. Scouler, growers' representative, of the Commonwealth Dried Fruits Control Board (p. 795), and Mr. Balfour, Chairman of the Victorian Dried Fruits Board (p. 719).

The following extract is from the evidence of Mr. Carroll (p. 426) :—

> "The supervision of dairy produce intended for the overseas markets was for twelve years carried out by State officials acting on behalf of, and under the authority from the Commonwealth, but in 1917 the Federal Government took direct control of the supervision of dairy exports, and established the Commonwealth Dairy Branch as a section of the Customs Department. From 1st January, 1927, this branch has been transferred to the Department of Markets and Migration."

The following extract is from the evidence of Mr. Allen (p. 670) :—

> "Dealing with fresh or frozen meat export . . . the establishments or abattoirs at which the cattle are slaughtered or frozen are licensed under the Commerce (Meat Export) Regulations. These regulations are made under the *Customs Act* 1901-1922 and the *Commerce (Trade Descriptions) Act* 1905. In the preparation of meat for export, the one staff is controlled by the Department of Markets and Migration."

The following extract is from the evidence of Mr. Scouler (pp. 795-796) :—

> "The Commonwealth Dried Fruits Control Board was constituted under the *Dried Fruits Export Control Act* 1924. . . . The board consists of seven members (*a*) a Government representative appointed by the Governor-General; (*b*) four growers' representatives elected by growers; (*c*) two members with commercial experience appointed by the Governor-General. . . . The Board may accept control of any dried fruits placed under its control for the purposes of the Act; and for the purpose of securing advances made at the request of the board to the owners of the fruit, the board has power to give security over such fruit.

The *Dried Fruits Export Charges* Act 1924 provided for a levy on all dried fruits exported from the Commonwealth. The levy is collected by the Collector of Customs, and paid from Consolidated Revenue into the Dried Fruits Export Fund. The moneys paid into the latter fund are applied by the board in payment of expenses incurred in carrying out its various functions under the Act. . . .

The *Export Guarantee Act* 1924 provides means for making advances on fruit placed under the control of the board. The Export Control Board commenced to function in time to handle the dried fruits export pack of 1925. The Act was passed as a result of representations made to the Commonwealth Government by the growers through the Australian Dried Fruits Association. In the earlier history of the industry, even before it became necessary to export, disaster had loomed owing to unorganized marketing. Finally, the growers formed the Australian Dried Fruits Association to overcome this trouble, and it functioned with considerable success until, in the *post bellum* years the export surplus gradually mounted, and other producing countries placed larger tonnages on the markets of the world. Prices on the export markets fell to a very low level. In 1924, the grower received considerably less than the cost of production—that is the grower who loyally observed the voluntary export quota which was fixed by the Australian Dried Fruits Association. Matters became so bad that some growers could not carry on, and, as a result of growers' representations the Commonwealth Government passed the *Dried Fruits Advances Act* 1924, under which moneys were loaned to growers to produce the crop for 1925. The growers had hoped that an Act could be passed by the Commonwealth Government which would create one body to deal effectively with marketing, both in Australia and abroad. Finally, State Acts were passed by Victoria and South Australia, which provided for a compulsory export quota. Later, Western Australia, and then New South Wales, passed similar Acts. The Export Control Board was created to deal with the problem of marketing the export quota."

The following extract is from the evidence of Mr. Balfour (p. 719) :—

"In view of the fact that production far exceeds the Australian consumption, and that the prices overseas are very considerably below those obtainable on the Australian market, it was found necessary in 1924 for the Government of the dried-fruits producing States to appoint boards to regulate the quantities which could be sold within the Commonwealth. Legislation is now in force in all the dried-fruit producing States with the object of ensuring that the annual surplus above Australian requirements shall be exported, and that all growers and packing sheds shall share equally in the better prices obtainable on the local market. These boards have, therefore, declared a uniform export percentage of the crop in each State, and supervision of arrangements for overseas sales of these fruits is exercised by a board appointed by the Federal Government."

Marketing.

It was urged before the Commission that the Commonwealth should have a general legislative power to make laws with respect to marketing. At present, its power extends only to marketing overseas and interstate, and it acts in co-operation with those States which have also made laws fixing the quotas of dried fruit to be consumed within the State and to be sold interstate. As portions of the Acts of these States have been held invalid as an infringement of section 92, it has been urged that those growers are placed at a disadvantage who are willing to regulate their sales in the interest of the whole trade. This difficulty, however, has been to some extent overcome by recent Commonwealth legislation relating to interstate trade.

A description of the manner in which fruit-canners and jam manufacturers have endeavoured to obtain markets for their products overseas by organization among themselves, will be found in the evidence of Mr. J. L. Moore, Secretary of the Commonwealth Jam Preserving and Condiment Manufacturers Association (pp. 368-369).

Export of birds and animals, and the skins of birds and animals.

The power of legislating with respect to trade and commerce with other countries has also been exercised through the Customs Act, for the purpose of regulating the export of birds and animals, and the skins of birds and animals. For this purpose, committees have been appointed in some of the States to advise the Customs authorities as to how this power should be exercised. It was strongly urged by some witnesses that this power of regulation, or prohibition, had not been used as it should have been to prevent the wholesale destruction of certain species. If a State does not itself protect the species, the Customs authorities will not regulate or prohibit the export of birds or animals, or the skins of birds or animals belonging to that species, which it is claimed have originally come from that State. If the Customs authorities had used their power adequately, they could, it was said, have prevented the wholesale destruction of native bears in Queensland, and the excessive export of birds from the north of Australia.

Freedom of Trade, Commerce, and Intercourse among the States.

The interpretation of Section 92.

The expression in section 92 of the Constitution "on the imposition of uniform duties of customs, trade, commerce, and intercourse, among the States, whether by internal carriage or ocean navigation, shall be absolutely free", was until the year 1916 interpreted as a command addressed to the Commonwealth as well as to the States, but no Act of the Commonwealth Parliament has been declared invalid as an infringement of section 92. In 1916, in the case of *Duncan* v. *State of Queensland* (22 C.L.R. 556) it was suggested, but not decided, that the command was addressed only to the States, and in 1920, in the case of *McArthur Ltd.* v. *State of Queensland* (28 C.L.R. 530), this interpretation was adopted by the High Court. It follows that the power of the Commonwealth Parliament to legislate with respect to trade and commerce among the States is unfettered, save by the requirement of section 99. It has been said that the right of the citizens is probably not carried much further by the word "intercourse" than the fact of

union necessarily carried it, though the express prohibition against restriction makes the Australian charter much stronger than the American with respect to trade and commerce (per Barton, *J.*, in *R.* v. *Smithers,* 16 C.L.R. 110).

Effect of Section 92 upon the States.

By virtue of this section the State of Western Australia has been prevented from imposing a higher licence fee for the sale of wine produced in another State than for the sale of wine produced in Western Australia. The State of Queensland has been prevented from enforcing legislation to fix the price of goods in so far as those goods were sold in pursuance of an interstate contract, and so it has been claimed that a State may be prevented from effectively enforcing a price-fixing law. The State of South Australia has been prevented from taxing goods imported from another State and not yet become mixed with the goods of South Australia, as by a tax on imported motor spirit (the *Petrol* case, 38 C.L.R. 425); and similar legislation passed in other States has been treated as invalid by reason of that decision. The State of New South Wales has been prevented from enforcing a law for prohibiting persons who have been convicted of crime from crossing its borders from other States, but whether a State may not prevent newly released or dangerous criminals from doing so seems doubtful (*R.* v. *Smithers,* 16 C.L.R. 110). Again the section does prevent a State legislature from fixing quotas of dried fruits produced in a State which may be marketed outside the State, and so has rendered ineffective portions of a number of Acts passed by the Parliaments of South Australia, Victoria, and New South Wales, with the object of promoting the dried-fruits industries, and of apportioning between producers profits of the home market and losses of the overseas market (*James* v. *South Australia,* 40 C.L.R. 1). Legislation with the same object, the *Dried Fruits Act* 1928, has been passed by the Commonwealth Parliament after consultation with the States, but this legislation is subject to the requirements of section 99.

Section 92, however, does not affect the title to goods, but only the disposition thereof. It did not, therefore, prevent the State of New South Wales during the War, from acquiring the whole of the wheat in New South Wales, although some of it was the subject of interstate contracts, or the State of South Australia from recently acquiring those dried fruits only which were the subject of interstate contracts. Section 92 may therefore render ineffective any marketing scheme which rests on State legislation, except in so far as it involves the acquisition of goods by the State.

Diseased or infectious animals or plants.

It was thought at one time that section 92 would prevent the enforcement of various State Acts designed to prevent the importation of diseased or infectious animals or plants from other States. Apparently conflicting dicta on this point may be found in decided cases. In *Duncan* v. *State of Queensland* (22 C.L.R. at p. 579) it is suggested that a State could prevent traffic in any class of goods by declaring them not to be proper subjects of commerce. In *W. & A. McArthur Ltd.* v. *State of Queensland* (28 C.L.R. at pp. 561-562) certain State Acts prohibiting or regulating the introduction of plants

or animals from other States are mentioned, and it is stated that these and other such restrictions were terminated by section 92, and future restrictions of a similar character on trade, commerce, or intercourse were forbidden. In the State of South Australia the question was regarded as so doubtful that on 1st August, 1911, the Commonwealth Government was called upon to issue and did issue a proclamation under the *Quarantine Act* 1908 forbidding the introduction of vines from New South Wales, Queensland or Victoria, for the purpose of protecting the vineyards of South Australia against phylloxera, and this proclamation was supplemented by others issued on the 25th October, 1912, and the 4th January, 1913. Similarly proclamations were issued on the 18th July, 1912, and the 18th September, 1912, forbidding the introduction of pear, apple, and quince trees into Western Australia (evidence, p. 1043). Apart from these instances, however, the States appear to have relied on State Acts to protect stock and plants within their boundaries from infection from other States, the States of Victoria and South Australia relying on the elaborate organization established for the northern border of New South Wales to protect them from infection from the tick-infested districts of Queensland. The value of the New South Wales system was maintained by expert witnesses not only in Victoria and New South Wales but in Queensland. Each State appears to take precautions by legislation against the introduction of unhealthy stock and plants from other States, and at the same time by intra-state quarantine to isolate infected districts for the purpose of preventing the spread of disease within the State. In the case of *Nelson* v. *Couch* ([1929] 35 *Argus* L.R. 21) the validity of the provisions of the New South Wales Stock Act authorizing the proclamation of certain areas in Queensland as infected with tick, and the imposition of restrictions on cattle crossing the border from these districts, was attacked on several grounds, but principally on the ground that they were forbidden by section 92. By the judgment of the Court, which was equally divided, the validity of the Act and proclamations was upheld on the ground that the State Act was not an Act restricting trade and commerce but facilitating it, that the State was not deprived of its right to legislate for the health of its stock, and would not be so deprived until the Commonwealth superseded the State Acts by a proclamation under the Quarantine Act. State Acts for the protection of stock and plants are therefore valid until the Commonwealth supersedes them.

Agents and dealers.

Under section 92 it is thought that a State cannot impose a special tax on commercial travellers from other States, and cannot subject them to income tax in respect of negotiations which do not ripen into contracts within the State. A State may pass a law regulating the affairs of agents within its borders even though those agents may be engaged in inter-state commerce (*Roughley* v. *New South Wales*; *Ex parte Beavis, In re Edwards,* [1929] 35 *Argus* L.R. 1).

Section 92 has also been thought to prevent a State from effectively protecting fish, birds, and other animals within its borders. It is thought that a dealer may rely on the section as a defence to a prosecution for having protected fish, birds, or animals in his possession, if he can allege that they were imported from another State. By

this means it is said that the protection of certain birds and fish in Victoria and of native bears in New South Wales has been rendered ineffective, there being no protection in the neighbouring States, and the protected States being powerless to prevent importations from these States. Several instances were given in evidence before the Commission in which section 92 was blamed for the destruction of native fauna (but *see* the remarks of Sir Isaac Isaacs in *Nelson* v. *Couch*, [1929] 35 *Argus* L.R. pp. 32-33.)

Section 92 has also been invoked to prevent a State requiring merchants to furnish returns of traffic to and from the State, in order that it may collect statistics of inter-state trade. Regulations with this object were issued on the 1st February, 1911, under the authority of the *Tasmanian Marine Boards Act Amendment Act* 1910, and the Secretary to the Attorney-General's Department of the Commonwealth advised that they were *ultra vires* section 92 (evidence p. 379). Since the opinion was given the collection of statistics has been discontinued, but it is clear that it could be resumed if authorized by an Act of the Commonwealth Parliament.

In the absence of inconsistent Commonwealth legislation, persons engaged in inter-state trade and commerce are amenable to the ordinary laws of a State. If for instance the goods are dangerous, as gun-powder, or wild cattle, or a mad dog, or are stolen or offensive, a dealer cannot deny his obligation to submit in respect of them to whatever laws are in force in the State on the subject (*McArthur's* case, 28 C.L.R. at p. 550; *Nelson* v. *Couch*, [1929] 35 *Argus* L.R. at p. 23).

Intoxicating liquors.

There is a special provision in section 113 of the Constitution with respect to intoxicating liquors, under which all fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, are to be subject to the laws of the State as if such liquids had been produced in the State. A State is, therefore, not debarred by section 92 and cannot be debarred by legislation passed under section 51 (i) of the Constitution, from enforcing local or state-wide prohibition.

Territories.

Section 92 does not apply to Territories, and does not prohibit a State from passing an Act regulating trade commerce and intercourse with a Territory.

XV.—NAVIGATION AND SHIPPING.

The provisions of the Constitution.

The Commonwealth Parliament has power to make laws with respect to trade and commerce with other countries and among the States (s. 51 (i)). Section 98 provides that this power extends to navigation and shipping. Under covering clause 5 the laws of the Commonwealth are to be in force on all British ships, the Sovereign's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth. Further, by section 76 (iii), the Parliament of the Commonwealth is empowered to confer on the High Court original jurisdiction in any matter of Admiralty and maritime jurisdiction. These powers must be read in conjunction with the *Merchant Shipping Act* 1894, which applies to all the British Dominions, but confers a power on each Dominion of legislating in certain respects independently for its own coastal shipping.

The power conferred by sections 51 (i) and 98 is not limited to transport, but enables the Commonwealth Parliament to regulate the reciprocal rights and obligations of those engaged in carrying on that traffic by means of ships. An Act relating to the compensation to be paid to seamen injured in the course of their duty is within the power (*Australian Steamships Limited* v. *Malcolm*, 19 C.L.R., 298).

The Navigation Act.

The Navigation Act of the Commonwealth was passed in 1912, when it was reserved for the signification of His Majesty's pleasure. Before the Act was introduced a royal commission had inquired into the subject of navigation in 1906, and there had been correspondence between the legal advisers of the Commonwealth and the legal adviser of the British Board of Trade in which the latter had challenged the validity of certain sections of the Navigation Act as repugnant to the Merchant Shipping Act.

The Navigation Act is divided into a number of parts to come into force on a date or dates to be fixed by proclamation. Certain sections of the Act have not yet been proclaimed, others came into force on the 1st July, 1921, the 1st October, 1921, the 1st March, 1922, the 1st February, 1923, the 1st March, 1923, the 1st October, 1923, and the 31st August, 1925.

The Commonwealth Act deals, and can deal only, with interstate and foreign shipping. Intra-state shipping is subject to State laws.

Different rules may prevail, therefore, and different conditions may apply to ships engaged in the interstate coastal trade and ships trading solely between the ports of one State. Different conditions may apply to the same ship, according to the voyage which it undertakes, or the waters which it traverses. Different standards may be applied in granting certificates, according as the certificates are to be used in interstate or intra-state trade. The same distinction does not apply to what has been called the rule of the road at sea, and the master of a vessel, though on an intra-state voyage, may be punished by the Federal law for an offence committed in waters traversed by interstate vessels.

The coastal clauses of the Navigation Act.

Attention was drawn to the coastal clauses of the Navigation Act (Part VI.) by a number of witnesses, including Sir Edward Mitchell who expressed a doubt whether those clauses were valid (evidence, p. 758). This Commission did not have before it sufficient evidence on which to come to a conclusion as to the effect of Part VI. of the Navigation Act on the several States, but it was evident that in Western Australia, Tasmania and South Australia the opinion was widely held that by reason of the operation of this part these States had suffered a serious grievance through their membership of the Federation.

The effect of the coastal clauses of the Navigation Act has been the subject of an inquiry by a royal commission and also in relation to Tasmania by the Public Accounts Committee of the Commonwealth Parliament. A number of witnesses before this Commission, particularly witnesses in Western Australia, Tasmania, and South Australia, said that these provisions had injuriously affected their respective States, both by reducing the number of ships by which freight might be despatched and by facilitating an increase of freights and fares. In Tasmania it was claimed that the tourist traffic had been curtailed by removing from the traffic those ships which were most attractive to wealthy passengers. To meet this claim an amendment of the Navigation Act was passed in 1926 exempting from the necessity of obtaining licences under the Act those States whose tourist traffic is shown to have been injuriously affected. It was further stated by Tasmanian witnesses that by reason of the lack of direct communication by interstate steamers with South Australia, Western Australia, and Queensland, and the inability of producers to ship goods by overseas vessels the cost of commodities had been greatly increased by freights and handling charges, and that business had been or might be lost through the possibility of delay in fulfilling contracts. It was said that restriction of shipping fell with most severity on Tasmania because of the large extent to which the producers of Tasmania depended on their export trade. Ships may be granted special exemption from the necessity of complying with the provisions of the Navigation Act, but it was complained that exemptions were withheld in cases where they might have been granted without detriment to Australian shipping, and that Deputy Directors of Navigation did not exercise a sufficiently wide discretion.

By a proclamation issued under the Navigation Act and published in the *Commonwealth Gazette* the 19th May, 1921, it was declared that the carrying of passengers and cargo between ports in the Northern Territory, and between ports in the Northern Territory and any other Australian port or ports shall not while the order is in force be deemed engaging in the coast trade. This proclamation, however, has been interpreted so as not to exempt a vessel which engages in trade between different ports of the same State and also with a port in the Northern Territory.

Under section 286 of the Navigation Act permits are granted by the Minister for Trade and Customs to specified British vessels to carry passengers and goods between Fremantle and north-west ports of Western Australia.

Navigation.

Owing to the existence of both State and Federal laws relating to shipping and navigation, questions have come before the Courts as to whether in the event of an accident an inquiry should be held by a State or by a Federal tribunal. It was held in *R.* v. *Turner* (39 C.L.R. 411) after consideration of the Merchant Shipping Act, and the Commonwealth Navigation Act, that a collision between two ferry boats which took place in waters beyond the range of interstate traffic should be investigated by a State tribunal, and later when a collision occurred within the waters of Port Jackson between an ocean-going vessel and a ferry steamer, it was arranged by the State and Federal authorities that a joint inquiry should be held. In *Hume* v. *Palmer* (38 C.L.R. 441) it was held that a master who had been convicted of a breach of the regulations relating to collisions within the waters of Port Jackson should have been tried under Federal and not under State laws. Evidence was given by the Port Master of Queensland that cases had occurred in which there had been considerable doubt as to the proper tribunal, that these doubts had caused considerable difficulty, which, however, had been to some extent overcome by the good feeling existing between State and Federal officials (evidence, p. 1564).

With regard to other matters relating to administration, the following evidence was given by Mr. L. F. East, Secretary, Marine Branch, Department of Trade and Customs (p. 453) :—

> "This division of control over coasting shipping applies not only to the particular matters covered by the judgments referred to, namely, manning, accommodation, licensing and rule of the road, but also to such other important matters as wireless installations, survey of hull, engines and equipment, load-lines and depth of loading, life-saving appliances and boat drills. As regards all these, there is at present one set of rules—the Federal—for interstate traders and, if the matter is covered at all, another—the State—for vessels employed within the State boundaries. The result is highly unsatisfactory in many ways. It involves, in the first place, unnecessary expenditure of public moneys in that it necessitates the maintenance in each State of two sets, Federal and State, of administrative, clerical and highly qualified technical officers, when one set would suffice. It means diversity of laws, with the result that a vessel that engages at one time in interstate, and at another time in intra-state, trading comes in turn under Federal and State jurisdiction, and must comply at such times with the laws of the particular jurisdiction applicable at the moment, which means, in practice, compliance with both sets. And last, but not least, it means that in certain important respects, as the installation of wireless, vessels under State jurisdiction fail to measure up to the standard which in the view of the Federal law is essential to the safety of life at sea.
>
> The following are the State Acts at present in operation in regard to intra-state shipping, and the authorities administering them:—New South Wales, *Navigation Act* 1901, Department of Navigation; Victoria, *Marine Act* 1915, Marine Board of Victoria; Queensland, *Navigation Act* 1876, Marine Department;

South Australia, *Marine Board and Navigation Act* 1881, Marine Board; West Australia, *Navigation Act* 1904, Harbours and Lights Department, and Tasmania, *The Marine Boards Act* 1889. Seven separate Marine Boards."

With this evidence should be compared the evidence of Captain J. E. Morris, late Superintendent of Navigation, New South Wales, and of Dr. Brissenden, K.C., speaking on behalf of the joint committee of the Bar Council and of the Law Institute of New South Wales. The following extract is from the evidence of Captain Morris (p. 1266).—

"Since 1st October, 1923, the provisions of the *Navigation Act, No.* 60, 1901, New South Wales, and amendments, have been limited to intra-state shipping, but the work of the department at Newcastle and such outports as Richmond River, Clarence River, Port Stephens, Bulli Jetty, Bellambi Jetty, Port Kembla, and Twofold Bay, has extended to interstate and oversea shipping. I would like to qualify that by adding that the officers of the department are not strictly limited to intra-state shipping, inasmuch as the pilots who pilot interstate or overseas shipping are under my control, and are State servants. The department's officers carry out inspections at Newcastle for the Commonwealth Navigation Service, and act as agents for the Commonwealth at the other places mentioned. The officers at Newcastle also do Port Stephens. Passenger steamers, cargo carriers, colliers, tugs, and other vessels trading solely within the limits of the State of New South Wales far exceed the total of interstate and foreign-going ships trading to New South Wales. Practically all intra-state vessels come under inspection and survey by this department, but the survey of interstate vessels is distributed among all the States, and the great majority of the foreign-going ships are not surveyed in Australia, and need comparatively little oversight by the Federal authorities. Inspections of intra-state vessels require much more attention and supervision by reason of their limited size and constant voyages than the larger interstate and oversea ships. The work specified is two-thirds State and one-third Federal in character, the intra-state trade of New South Wales greatly exceeding that of the rest of Australia combined, the coast trade division representing in the constant voyages of coasting vessels more than 70 per cent. of shipping using New South Wales ports. This percentage holds good with ship surveys and inspections.

How far is there overlapping of the functions of the State and Commonwealth Navigation Departments?—There is no overlapping of activities in the sense that work already executed by one department is again carried out by the other, but identical services as under are performed by the two departments in their respective statutory jurisdictions. These are briefly:—(*a*) examination of masters, mates, and engineers, for certificates of competency; (*b*) survey and inspection of steamships as to condition of hull and machinery, equipment, loading, accommodation, &c., in effect, seaworthiness; (*c*) marine inquiries, and (*d*) sailing rules. The assumption by the Commonwealth in this State of the functions specified did not seriously affect the volume or importance of the State department's activities. Whatever portion of the alleged

overlapping functions might be transferred to Federal control, the fact remains that the State department would still be required to act as a conservancy authority, and State officers at all ports would be necessary for the carrying out of State obligations under the Constitution.

What do you mean by 'conservancy authority'?—At the out-ports the pilots of the ports serve in more than a single capacity; the pilot acts as Harbour Master, officer in charge of harbour and tonnage dues, and so on; the pilot is in charge of a port, in addition to doing the pilotage work, and that work, particularly on the north coast, includes almost daily sounding of the bars, otherwise navigators could not use them."

The joint committee for which Dr. Brissenden spoke strongly urged that there should be a single authority to deal with shipping and navigation (p. 1120) :—

"For the purpose of this memorandum navigation and shipping, regarded as a subject of legislation, may be briefly defined as consisting of those matters which are dealt with by the *Navigation Act* 1912 and the Merchant Shipping Acts.

'The Constitution does not endow Parliament with a substantive power to deal with navigation and shipping at large. It only empowers it to deal with that subject in so far as it is relevant to interstate and foreign trade and commerce'.—*Newcastle & Hunter River Steamship Company* v. *Attorney-General for Commonwealth* (29 C.L.R., 368).

The result is that the Federal Parliament has no legislative power, nor have its officers any executive power, over vessels which are solely engaged in intra-state trade, although these run side by side on the common highway of the sea with the vessels engaged in foreign or interstate trade, and are practically subject to the same law; since in all essentials both Federal and State law are drawn from the Merchant Shipping Acts.

This divided authority over a single subject-matter leads to quite unnecessary difficulties. Examples of the questions to which it gives rise may be seen in *Hume* v. *Palmer* (38 C.L.R., 441) and *R.* v. *Turner* (39 C.L.R., 411). In this case, a collision between a foreign trade vessel and an intra-state vessel, there is no legal reason to prevent simultaneous Marine Court inquiries by State and Commonwealth, in which it is possible the conclusions may be directly contradictory.

We submit that the Constitution should be so amended that the Federal power should cover navigation and shipping as a single substantive subject-matter independent of the trade and commerce power, thus restoring it to the position of a placitum of section 51 as in the draft bills of 1891 and 1897."

Where State legislation on the subject of wireless installations in ships engaged in intra-state trade does not exist, the Royal Commission on Wireless (14th July, 1927) expressed the opinion that representations should be made to the State Governments concerned to bring ships within provisions similar to those of section 231 of the Navigation Act.

The provisions of the Commonwealth Navigation Act relating to pilots have not yet been proclaimed.

Admiralty.

From the decision in the case of *John Sharp & Sons* v. *s.s. Katherine Mackall* (34 C.L.R. 420) it follows that the Commonwealth of Australia is a British possession within the meaning of the *Colonial Courts of Admiralty Act* 1890. It is, therefore, doubtful whether the State Courts have any jurisdiction in admiralty, though jurisdiction may be conferred on them by Commonwealth legislation.

The following extract is from the evidence of Mr. Owen Dixon, on behalf of the Committee of Counsel of Victoria (pp. 784-785) :—

"An incidental result of the Commonwealth's attempt to confer full jurisdiction upon the High Court has been to create doubts in relation to the jurisdiction of the Supreme Courts of the States. The full content of the jurisdiction was supported by means of the Imperial *Colonial Courts of Admiralty Act* 1890. A consideration of the Colonial Courts of Admiralty Act with the Imperial Acts Interpretation Act will show that it is not at all improbable that the High Court of Australia and the Supreme Courts of the State cannot both at the same time answer the description upon which, in the absence of legislative declaration, the jurisdiction depends, viz., the courts of law in a British possession of original unlimited civil jurisdiction. Whether the State courts have admiralty jurisdiction or not has thus become uncertain, although they have exercised it up till that time and without question until the problem arose whether the High Court possessed the extension of admiralty jurisdiction which might or might not come within the words maritime jurisdiction, but which certainly came under the Colonial Courts of Admiralty Act."

Lighthouses, lightships, beacons and buoys.

The Commonwealth Parliament may legislate with respect to lighthouses, lightships, beacons and buoys. In the draft Constitution of 1891 the power was limited to ocean lighthouses and lightships, and ocean beacons and buoys, the object being to give the Commonwealth control over external and coastal services of this kind, whilst matters capable of internal regulation, such as lights, beacons and buoys situated in harbours and rivers, were to remain under the control of the States.

The following extracts are taken from the evidence of Mr. E. T. Hall, Comptroller-General of Customs (pp. 384-385) :—

"The power of the Commonwealth Parliament to make laws in regard to lighthouses, &c., is not subject to qualifying conditions, as is the case with the power relating to navigation and shipping, and appears to be wide enough to enable the Commonwealth to deal effectively with the subject-matter covered, in its widest interpretation.

In exercise of the powers conferred by section 51 (vii) of the Constitution, the Commonwealth Parliament has enacted the following Acts relating to lighthouses—No. 14 of 1911, No. 17 of 1915, and No. 6 of 1919.

The *Lighthouses Act* 1911-1919 empowers the Commonwealth Government to make an agreement with any State or person for the acquisition by the Commonwealth of any lighthouse or marine mark, or, failing an agreement in the matter, to acquire such by

compulsory process. The Commonwealth administration is authorized to erect, alter, or remove lighthouses and marine marks within the jurisdiction of the Commonwealth. The Act also contains the necessary provisions for the protection of Commonwealth lights and marks, and for imposing light dues upon vessels. Upon the imposition of such dues, it is declared, the light dues prescribed by or under any State Act (other than dues solely in respect of lights maintained by the State) shall cease to have effect.

Up to 30th June, 1915, all lighthouses, lightships, beacons and buoys in Australian waters continued to be administered by State departments and locally constituted authorities, such as harbour trusts and marine boards.

On 1st July, 1915, the Commonwealth took over control of all coastal lighthouses, lightships, beacons and buoys.

All inner lighthouse and other marine marks, e.g., those marking the port channels, harbours, and rivers, remained, and continue to remain, under the control of the various States and local port authorities.

The administration of the Lighthouses Act is placed by that Act in the hands of the Minister for Trade and Customs. The immediate supervision of the Commonwealth lighthouse service is entrusted to the Director of Lighthouses, who, until 30th June, 1927, was directly responsible to the Comptroller-General of Customs. From 1st July, 1927, the Commonwealth lighthouse service was amalgamated with the Commonwealth navigation service, to constitute the Marine Branch of the Department of Trade and Customs.

The principal function of the Commonwealth lighthouse service is the construction and maintenance of marine lights and marks on the coast of Australia and Tasmania. Certain other duties, of relatively minor importance, are also performed, such as receiving and sending shipping messages, attending where required to tide and weather signals, obtaining meteorological information, and in some cases lightkeepers or their wives act as postal officials.

Possibility of duplication of Federal and State activities.—The possibility of this occurs in relation to (*a*) the construction and maintenance of marine lights and marks; (*b*) the duties performed by the staffs; (*c*) the control of existing coastal and harbour lights, involving possible duplication of plant and staff.

Concerning (*a*), construction, since the Commonwealth assumed control of coastal lights in 1915, no new light has been established which is within range of any State light. Neither has any State established a light which overlaps a coastal light under the control of the Commonwealth.

None of the existing coastal lights could be discontinued by reason of the fact that a light under State control meets necessary navigational requirements. It may here be added that, wherever possible, the lights under the control of the Commonwealth are also adapted to meet as far as possible the requirements of the State.

From the above, it will be seen that under this heading there has been no duplication or overlapping in the lights established on the coast.

As to (*b*), overlapping or duplication of staffs, there are no lighthouse stations, under the control of the Commonwealth and of a State respectively, at which the duties of the staffs could be interchanged. It may be mentioned, however, that in Queensland State officials attend to certain lights on behalf of the Commonwealth lighthouse service.

With reference to (*c*), control of coastal and harbour lights—port lights and marks are at the present under the control of State or port authorities. It has been suggested in certain quarters that all such lights should, with the coastal lights, be placed under the control of the Commonwealth.

This matter has received careful consideration at various times, and the opinion formed is that the maintenance of port lights could not be carried out as economically by the Commonwealth lighthouse service as by the State and local authorities at present in charge.

The reason is, chiefly, that the State and port authorities utilize the plant and staff for other port duties, as well as attending to the lights and marks.

From 1st July, 1915, the Commonwealth levied light dues at the following rates:—(*a*) for any ship of less than 4,500 tons—8d. per ton; and (*b*) for any ship of 4,500 tons or upwards—£150. For ships calling at one port only in Australia *en route* to a port or destination outside Australia, the rate was—for vessels of less than 4,500 tons—4d. per ton; and for vessels of 4,500 tons or upwards—£75.

Rates are required to be paid quarterly and are levied on the net registered tonnage of the ship.

Variations of the above rates were made and brought into operation on 1st January, 1918, when the rate was increased for vessels classed (*a*) and (*b*) above to 9d. per ton, and the maximum charge of £150 omitted. For vessels calling at one port only, the rate was raised to 5d. per ton, without fixed maximum. These latter rates are those now in force.

Prior to the assumption of Commonwealth control of coastal lights, the States and State authorities levied dues under local Acts and regulations. On the control of coastal lights being transferred to the Commonwealth, on 1st July, 1915, the State of Tasmania abolished local light dues; Queensland and Western Australia reduced their light dues by one-half, but New South Wales, Victoria and South Australia made no alteration.

A memorandum on the subject of dues charged by State authorities was presented to the Conference of Commonwealth and State Ministers held at Melbourne in May-June, 1923 (*vide* pp. 133, *et seq.* of printed report, Parliamentary Paper, 1923, No. 38).

In this memorandum reference is made to the fact that although the States of Victoria, New South Wales and South Australia had been relieved of a large expenditure on coastal lights when the Commonwealth took control of the latter, they made no alteration in their dues. It may be added that all the States, with the exception of New South Wales, by agreement, decided that the combined dues levied by State local authorities should be designated

'port dues.' In the case of the State of New South Wales, under an Act which has not yet been repealed, such dues are termed 'harbour and light dues.'

As mentioned above, the power of the Commonwealth Parliament to make laws in regard to lighthouses, &c., appears to be fully adequate to enable the Commonwealth to deal effectively with the subject. No amendment of the Constitution, it is suggested, is necessary or desirable in this connexion."

Evidence was given on behalf of the Chamber of Commerce, Hobart, that the transfer of lighthouses to Federal control had materially raised the amount of dues payable by shipping, and had deterred vessels from calling at Hobart, and in particular those vessels for which Hobart was the one port of call in the voyage from the Cape to New Zealand.

XVI.—INDUSTRIAL POWERS.

Industrial arbitration.

The Commonwealth Parliament has power under section 51 (xxxv) to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. It also has unlimited power to appoint a tribunal to determine the conditions of labour of employees of the Commonwealth, and this power has been exercised.

No State has power to control, by legislation or adjudication, disputes beyond its own borders, but each State has power to make provision for the prevention or settlement of disputes within its own borders and each State has done so. There is, therefore, in the Commonwealth as a whole one tribunal for the prevention and settlement of disputes extending beyond the limits of any one State, and there are six tribunals dealing with intra-state disputes. In the State of New South Wales there is a court known as the Industrial Commission, and there are conciliation committees from which an appeal lies to that court. In the State of South Australia there are wages boards appointed for three years, and there is a court presided over by a president. In Western Australia there is an industrial court consisting of a judge and two lay members, one nominated by the unions of workers, and the other by the unions of employers. In Victoria and Tasmania there are wages boards, in Victoria there being an appeal to a court. In Queensland there is a Board of Trade and Arbitration, of which a Supreme Court judge is president, and of which there are two other members appointed by the Governor-in-Council.

From recent interpretations of section 51 (xxxv) it follows that whether a dispute exists, or whether it extends beyond any one State, usually depends on the choice of the party which first decides to appeal tc the court. It also follows that there is from time to time confusion between the Federal and State jurisdiction, and between Federal and State awards, and that the question whether disputants will seek a Federal or a State tribunal will depend on the opinion formed by the applicants of the tribunal for the time being.

Registered organizations.

On the 31st December, 1928, there were registered under the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 one hundred and forty-eight organizations of employees and twenty-six organizations of employers. The whole number of unionists covered by Federal awards is estimated at 406,000, or approximately half the unionists of the Commonwealth.

Industrial awards and agreements.

A table at p. 540 of the *Commonwealth Year-Book* for 1928 sets out, as at the 31st December in the years 1913, 1926 and 1927—(*a*) the number of boards authorized and the number of boards constituted by each State, together with the number of such boards which had made awards or determinations; (*b*) the number of awards and determinations in force made by the Commonwealth Court, the Commonwealth Public Service Arbitrator, and the tribunals in each State; (*c*) the number of awards made by the Commonwealth Court in force in each State;

(*d*) the number of awards made by the Commonwealth Court, and the number of determinations made by the Commonwealth Public Service Arbitrator, in force in each State; (*e*) the number of Commonwealth and State industrial agreements in force; and (*f*) the number of Commonwealth industrial agreements in force in each State. The table is set out below:—

Boards Authorized, Awards, Etc.—Summary, 1913, 1926, and 1927.

Particulars.	At 31st December.	Commonwealth. Court.	Commonwealth. Public Service Arbitrator.	New South Wales.	Victoria.	Queensland.	South Australia.	Western Australia.	Tasmania.	Total.
Boards Authorized, &c. (a)—Boards authorized	1913	..	..	(b) 216	135	75	56	..	23	505
	1926	..	..	291	182	2	75	..	49	599
	1927	..	..	300	183	2	76	3	49	613
Boards constituted ..	1913	..	..	(b) 223	132	74	51	..	21	501
	1926	..	..	291	180	2	49	..	43	565
	1927	..	..	298	176	2	25	3	43	547
Boards which have made Awards or Determinations	1913	..	..	123	123	74	47	..	19	386
	1926	..	..	265	168	..	66	..	39	538
	1927	..	..	273	169	..	53	..	39	534
Awards and Determinations—Awards and Determinations in force	1913	17	..	(c) 265	127	73	54	18	21	575
	1926	199	34	346	179	237	109	107	51	1,262
	1927	223	36	398	180	248	112	110	51	1,358
State Awards and Determinations—Applying to whole State	1913	..	..	32	8	3	..	..	15	58
	1926	..	..	54	67	66	16	5	41	249
	1927	..	..	89	66	70	16	5	41	287
Applying to Metropolitan Area	1913	..	..	58	..	28	53	13	1	153
	1926	..	..	94	2	60	64	59	1	280
	1927	..	..	103	2	62	65	61	1	294
Applying to Metropolitan and Country Areas	1913	..	..	49	105	1	..	1	5	161
	1926	..	..	133	97	47	2	10	7	296
	1927	..	..	134	99	52	2	10	7	304
Applying to country areas	1913	..	..	126	14	41	1	4	..	186
	1926	..	..	65	13	64	27	33	2	204
	1927	..	..	72	13	64	29	34	2	214
Commonwealth Court awards—Awards in force in each State	1913	..	..	13	17	15	16	9	13	..
	1926	..	..	123	144	39	111	41	78	..
	1927	..	..	131	156	41	126	46	85	..
Commonwealth Public Service Arbitrator—Determinations in force in each State	1926	..	..	32	29	27	27	27	26	..
	1927	..	..	34	29	27	27	27	26	..
Industrial Agreements in force	1913	228	..	75	..	5	11	82	..	401
	1926	252	..	167	..	95	48	115	4	681
	1927	260	..	177	..	108	51	144	4	744
Commonwealth Agreements in force in each State	1913	..	..	132	129	68	62	57	61	..
	1926	..	..	90	105	28	25	19	25	..
	1927	..	..	97	103	31	27	19	23	..

(*a*) The figures for New South Wales are exclusive of Demarcation Boards.
(*b*) Including boards which were subsequently dissolved, owing to alteration in the sectional arrangement of industries and callings.
(*c*) Omitting a number of awards which expired on the 31st December, 1913.

Interpretation of Section 51 (xxxv).

For some years after the establishment of the Commonwealth Court in 1904, section 51 (xxxv) was given a far more restricted interpretation than it has to-day, and the disputes with which the Court was held entitled to deal were less numerous. Litigation concerning the jurisdiction and powers of the Court has been directed mainly to the interpretation of the words "industrial", "disputes", and "extending beyond any one State", and to the questions whether the Court has power to make a common rule and whether an award of a court is valid if it is inconsistent with the legislation of a State or the decision of a State tribunal.

Since the power to legislate with respect to industrial disputes is by means of conciliation and arbitration, the Commonwealth Parliament itself cannot legislate for fixing hours and rates of pay, or minimum rates of pay and maximum hours of work, for the whole or any part of Australia, or for any industry, and it cannot empower a Court to do any of these things by means of a common rule. The Federal Court, therefore, differs from a State tribunal which, being the creature of a Parliament of which the powers are limited only by the Commonwealth Constitution, may be empowered to make awards binding all persons engaged in an industry within the area of its jurisdiction.

The term "industrial" does not limit the arbitral power to production by means of manufacture. The power extends to mining (*Jumbunna* case, 6 C.L.R. 309), and employees of banking and insurance companies (*Australian Insurance Staffs' Federation* v. *Accident Underwriters' Association*; *Bank Officials' Association* v. *Bank of Australasia and others,* 33 C.L.R. 517)). Nor is it limited to industries carried on for profit (*Municipalities* case, 26 C.L.R. 508), but the power does not extend to teachers (*Federated State School Teachers' Association* v. *State of Victoria,* [1929] 35 *Argus* L.R. 129).

The term "disputes" means disputes which may be created by the service of a log containing a demand for changes in industrial conditions, and the refusal of that demand. There need not necessarily have been any disputes existing between employers and employees apart from the service of a log, nor any dispute threatening the industrial peace of more than one State. The dispute becomes interstate if persons engaged in the same industry employed in different States join in the service of the same log (*Federated Felt Hatters* v. *Denton,* 18 C.L.R. 881; *Builders' Labourers case,* 24 C.L.R. 396; 1917 A.C. 528).

The award of the Federal Court will not bind employers or employees who are not parties to the dispute or who have not been served with the log either individually or as members of a registered organization, but an employer may be made a party to a dispute whether he has any dispute with his own employees or not. All employers are connected together, by the mere fact of their being engaged in the same industry, in such a way as to make them proper parties to a dispute so soon as the dispute is initiated, and all employees are connected together in the same way (*Burwood Cinema* case, 35 C.L.R. 528).

The Federal Court is empowered to deal in its awards with industrial matters, and the term "industrial matters" includes a great number of the details of industrial conditions besides wages and hours. It has been held by the High Court that the Federal Court is not empowered by the *Commonwealth Conciliation and Arbitration Act* 1904-1928 to make an award dealing with non-unionists, not named as parties, who are in the employ of a party to the award (*Amalgamated Engineering Union* v. *Alderdice Proprietary Ltd.,* 41 C.L.R. 402). In the *Musicians'* case (24 C.A.R. 517) it had been held by Chief Judge Dethridge that a union may have an interest in the employment of persons other than its own members, and that having that interest it may create an industrial dispute concerning their conditions within the meaning of the Act.

Since no one is bound by an award who is not a party to a dispute, either personally or through a registered organization, it has sometimes been necessary to serve large numbers of individuals, and it has happened

that persons engaged in an industry subject to a Federal award are not parties to that award and may therefore make application to a State tribunal and become bound by its decision to observe different conditions from those imposed by the Federal Court. In this way there have been two awards in the same craft and in the same industry, operating in the same States, at the same time, and imposing different wages and conditions of labour. From this cause has arisen great uncertainty and difficulty in the management of industries owing to diversity in the details prescribed by Federal and State awards.

To meet the difficulty involved in serving numerous persons it has been enacted by an amendment to the Commonwealth Conciliation and Arbitration Act passed in 1928 that the Court may make an order appointing representative respondents, that the order shall be published forthwith in the *Commonwealth Gazette,* that all documents served on the representative respondents shall be deemed to have been served upon all the interested persons specified in the order, and that any award or order of the court made in the matter shall be binding on those interested persons.

Relations of State and Federal Courts.

By section 20 of the Commonwealth Conciliation and Arbitration Act provision is made to enable the Federal Court to prevent a State tribunal from dealing with any matter with which it is dealing or is about to deal. This section gives the Federal Court power to restrain either State Courts or Wages Boards, and is followed by provisions, in Division 4 of Part III., which enable State and Federal Courts to confer in order to prevent the existence of conflicting or overlapping awards. The Federal Court is a controlling authority, but by the amending Act of 1928 is directed, in the case of every industrial dispute, to consider in the course of the hearing and as promptly as possible if there is anything in the nature or circumstances of the industry which makes it more desirable that the dispute or any part of it should be dealt with by the Court than by a State industrial authority or by State industrial authorities in the several States, and unless the Court so declares it shall dismiss or refrain from further hearing or determining the dispute or part of the dispute (s. 38 c.)

In *Federated Hotel, Club, Restaurant, and Caterers Employees Union of Australia* v. *Abbott and Others* (No. 33 of 1928), Chief Judge Dethridge refrained, in the absence of special circumstances, from hearing or determining a dispute in regard to the conditions of employment of employees engaged in or in connexion with restaurants, cafes, coffee palaces and eating houses. The following tests were laid down for the purpose of deciding whether a dispute would be better dealt with by the Federal Court:—

> "Where the conduct of an industry does not involve (1) any competition or any more than an inconsiderable amount of competition between establishments in one State and those in another; or (2) the employment to a great extent of labour migrating from one State to another; or (3) the management of branches or departments in two or more States; or (4) the employment of labour substantially and directly in connexion with exports or imports from or into Australia or a State thereof; or (5) the existence of other circumstances making the intervention of a Federal tribunal

more desirable than that of a State tribunal; and there are State tribunals in existence with power to deal with the disputes that are likely to arise in the industry—in my opinion this Court should leave the regulation of the subject-matter of those disputes to the State tribunals."

The Commonwealth Parliament by virtue of the powers conferred on it by section 51 (xxxv) and (xxxix) has made laws prohibiting a strike or lock-out as those terms are defined by section 4 of the Commonwealth Conciliation and Arbitration Act, and imposing penalties for a breach of this prohibition and for aiding and abetting or encouraging others in a strike or lock-out. These laws have been passed in the *Commonwealth Conciliation and Arbitration Act* 1904-1928, and in the *Crimes Act* 1914-1928 (see *Stemp* v. *Australian Glass Manufacturers Company,* 23 C.L.R. 226, and *Walsh* v. *Sainsbury,* 36 C.L.R. 464), and the Court may issue an order in the nature of a mandamus or an injunction against an organization for the purpose of enforcing an award (*Waddell* v. *Australian Workers' Union,* 30 C.L.R. 570; *Waterside Workers Federation* v. *Gilchrist Watt* 34 C.L.R. 482; *Australian Commonwealth Shipping Board* v. *Federated Seamens' Union,* 35 C.L.R. 462), but this power may not be applied as against members of an organization of employees bound by an award to prevent them from striking while in the employment of an employer who is not bound by an award (*Metropolitan Gas Co.* v. *Federated Gas Employees,* 35 C.L.R. 449).

State Employees.

In the *Conciliation and Arbitration Act* 1904, section 4, the term "industrial dispute" was defined as *inter alia* including disputes in relation to employment upon State railways, or to employment in industries carried on by or under the control of the Commonwealth or a State, or any public authority constituted under the Commonwealth or a State.

On the 17th December, 1906, it was held in the *Railway Servants* case (4 C.L.R. 488) that, State railways being a State instrumentality, the portion of the definition which referred to State railways was *ultra vires.* In 1911 and 1913 it was proposed that the Constitution should be altered so that the Commonwealth Court might be given power to fix wages and hours of labour on State railways, but these proposals were rejected. In 1918 in the *Federal Municipal and Shire Council Employees* v. *Councillors and Citizens of Melbourne* (26 C.L.R. 508) the principle of the *Railway Servants'* case was affirmed. In 1920, in the *Engineers'* case (28 C.L.R. 129), the decision was overruled, and the principle affirmed that all employees in State industries were within the jurisdiction of the Court, although not mentioned in the Act. It was said, however, in the *Engineers'* case that the Court would not exercise jurisdiction over persons engaged in strictly governmental functions, such as legislative, executive, and judicial functions, without which a constitutional State cannot be conceived.

Evidence was given before the Commission that in 1923 a resolution was passed at a Premiers' Conference, that State employees should be denied access to the Commonwealth Court, first by an amendment of the Conciliation and Arbitration Act and afterwards by an amendment of the Constitution. Objection was taken, at the Premiers' Conference,

and by witnesses before the Commission, to the inclusion of State servants, on the ground that their inclusion was detrimental to State finances, that it made it impossible for a Treasurer to estimate his expenditure, and that it deprived the States of the power of controlling their own revenue. It was also argued that the inclusion of State servants, and in particular of railway servants, placed the organization of State industries in the hands of a court which could not be so well acquainted with the details of these services as tribunals appointed by the States themselves. Evidence was given, on the other hand, of the determination of great numbers of unionists, principally members of the Australian Railways Union, and of the Australian Federated Union of Locomotive Engineers to resist this proposed exclusion, and of the members of these and other unions to obtain, if necessary, an amendment of the Constitution which would ensure to all State employees access to the Federal Court. It appears, however, that State employees in Western Australia and Queensland, and a considerable section of State employees in South Australia, have not sought access to the Federal Court. The association which made the claim in the *Teachers'* case included teachers in each State.

State laws.

It was held by the High Court in *Whybrow's* case (1910, 10 C.L.R. 266) that a Federal award, if inconsistent with a State law, is invalid, and that the test of inconsistency is whether both can be obeyed. In *Clyde Engineering Company* v. *Cowburn* (1926, 37 C.L.R. 466) this decision was overruled, and it was held that an award of the Federal Court, once validly made, prevails over any inconsistent State law, and that the test of inconsistency is whether the result of enforcing a State law would be to destroy or vary the adjustments of industrial relations established by the award with respect to the matters formerly in dispute. An award of the Federal Court is, therefore, a law of the Commonwealth within the meaning of section 109 of the Constitution, and must prevail over an inconsistent State law to the extent of the inconsistency. It follows that a law of a State affecting industrial relations may cease to be binding on those who are bound by a Federal award, so soon as that award is issued, and in this way Acts dealing with employers and employees, or with apprentices, may be binding on some of the residents of a State, but not on others.

Witnesses before the Commission expressed the opinion that the effect of this decision was open to objection on either of two grounds, or on both. It gave to a Court an authority which should be exercised by Parliament, but which could not be controlled by Parliament except by the repeal or amendment of the Conciliation and Arbitration Act. It added to the difficulty of the State legislatures by rendering the validity of all State industrial laws uncertain in so far as they might affect persons bound by Federal awards, and prevented State Governments from giving Parliamentary time to the consideration of useful reforms. It was said by Mr. Holman, K.C., that so long as State legislation on such subjects as apprenticeship or housing might be found inconsistent with some Federal award, made or to be made, Ministers would not set aside time for the consideration of measures dealing with these subjects.

Congestion.

The opinion was expressed that the work of the Court should be further decentralised, whether its scope is increased by a constitutional amendment or not. Mr. H. C. Gibson, an industrial advocate of long experience, who gave evidence on behalf of the Australasian Council of Trade Unions in favour of the Commonwealth having full power in regard to all industrial matters, expressed himself on this point as follows (evidence, p. 1379) :—

> "My experience shows me that, if we are going to rely for arbitration on one court having jurisdiction over the whole Commonwealth, it will fall of its own weight. The cases listed before it could not be reached in five years, and I would point out in this connexion that delay at the present time is one of the most pregnant causes of dissatisfaction. In the case of our first application to the Federal Arbitration Court, the period of time from when we lodged the application until the time when we got our award was three years and nine months. On the second occasion matters were expedited a little, but it took us two years, and on the third occasion we got it down to fifteen months. In the case of our present application, it was filed in the court on the 12th January this year, and I think it is somewhere about No. 172 on the list at the present time [19th March, 1928]. Applications have been lodged by our organization eighteen months ago, and they have still not had a date fixed for hearing.
>
> Would you say that your experience has been the experience of most of the other organizations? I think that experience is general in labour circles."

Mr. Walsh, Industrial Registrar for the State of Western Australia, expressed the opinion that this inconvenience had been mitigated to some extent by the establishment of boards of reference, and by occasional visits from the Court to outlying States (evidence, p. 606).

Writ of Prohibition.

The Commonwealth Parliament cannot deprive the High Court of an authority which the Constitution has conferred on it. Although section 31 of the Conciliation and Arbitration Act provides that no award or order of the Court shall be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition mandamus or injunction, in any other Court on any account whatever, yet since the President or Judge is an officer of the Commonwealth, he is liable to prohibition if he adjudicates on some question not within the language of section 51 (xxxv). The issue of a prohibition, after a prolonged hearing in some cases, led to much expense and much waste of time. Section 21AA was therefore enacted, which gave either party a right to apply before the hearing to the High Court for a decision whether an alleged dispute was or was not within the jurisdiction of the Court. As prohibition is a discretionary remedy, the Court announced that it would require parties to make use of the liberty given by section 21AA, and in exercising its discretion would consider whether the parties had done so (*Ex parte Motions and Prohibitions*, 21 C.L.R. 669).

Industrial Peace Acts.

In further exercise of the power conferred by section 51 (xxxv) of the Constitution the Parliament passed the *Industrial Peace Act* 1920, assented to the 13th September, 1920, together with an amending Act of the same year (No. 55 of 1920).

The Act is divided into six parts. The first part consists of definitions. The second part authorizes the Governor-General to establish a Commonwealth Council of industrial representatives. This Council is to consist of a chairman and of an even number, not less than six nor more than eight other members, of whom one half shall be representatives of employees, and one half representative of employers, to be recommended respectively by organizations of employees and employers. The powers and functions of this Council are, *inter alia,* to consider any matters conditions and tendencies in any part of the Commonwealth leading or likely to lead to industrial disputes or affecting or likely to affect industrial peace, to confer with any persons or associations as to any matters affecting the prevention or settlement of industrial disputes, and to report to the Governor-General on any industrial matter. This Council has never been established. The formation of a Commonwealth Board of Trade and Industry, with similar but wider powers, under a unified Constitution, was advocated by Mr. Kneebone, a member of the Federal Executive of the Australian Labour Party, and vice-president of the Australasian Council of Trade Unions (evidence, p. 1035). The third part of the Act provides for the appointment of District Councils of industrial representatives subsidiary to the Commonwealth Council, and similarly composed. The fourth part of the Act gives the Governor-General power to appoint any special tribunal or tribunals for the settlement of any industrial dispute or disputes. A special tribunal is to consist of an equal number of employees' and of employers' representatives, and of a chairman either chosen by agreement or appointed by the Governor-General. These tribunals have powers similar to those of the Commonwealth Court of Conciliation and Arbitration, and may enquire into all matters relative to a dispute from the point of production to the final disposal of the commodity. Part five provides for local boards, to exercise jurisdiction within such limits as are defined or prescribed by the local tribunal. Part six gives any party to a proceeding before a special tribunal power to apply to the High Court to decide a question of jurisdiction and gives the chairman the power of applying to the High Court for a decision on any question of law. Tribunals under this Act have been appointed in connexion with the coal industry only.

XVII.—HEALTH.

Quarantine and other powers affecting Health.

The Commonwealth Parliament has no power to legislate with respect to health except in so far as it may do so in exercise of its powers to legislate with respect to imports and exports, to trade and commerce between the States, or to quarantine. The Commonwealth is also directly interested in the improvement of the health of the people, through its control of Territories within the tropics, through its responsibility for defence and the defence force, through its responsibility for old-age and invalidity pensions, and through its provision of the maternity bonus. The Commonwealth Parliament has no power to legislate with respect to industrial hygiene or local sanitation, except in connexion with Commonwealth property, or through an award of the Arbitration Court.

The Commonwealth Parliament has legislated with respect to imported goods by the *Commerce (Trade Descriptions) Act* 1905, and by the *Customs Act* 1901-1925, and for quarantine by the *Quarantine Act* 1908-1924. The *Quarantine Act* 1908 was amended by Acts of 1912, 1915, 1920, and 1924. The quarantine power has been interpreted so as to include legislation with respect to plants and animals, as well as human beings, and with respect to isolation, segregation, and disinfection, not only on the outside borders of Australia, but between the States and in any part of Australia.

The quarantine power has not become exclusive either by the transfer of State departments as authorized by the Constitution, or by legislation covering the whole field. The States may still exercise certain quarantine functions, particularly in relation to inter-state traffic in animals, but since the passing of the amending Act of 1920 State laws may be suspended on a proclamation issued by the Governor-General in an emergency.

Health Conferences.

For some time after the establishment of the Commonwealth, conferences for the consideration of problems of public health were held among the State officials, at many of which the Commonwealth was represented. A conference of State officials was held in 1904 at the invitation of the then Prime Minister, when it was recommended that the Commonwealth should take over the control of inter-state quarantine. Another conference was also convened by the Prime Minister and held in 1909, after the *Quarantine Act* 1908 had been passed, but before it had come into operation. This conference considered the staff that would be required under the new Act, and the limits of Commonwealth and State jurisdiction.

A conference that has been described as the turning point in the history of health administration was held in 1913, after an outbreak of small-pox in New South Wales, when the Commonwealth had intervened and declared part of New South Wales to be a quarantine area. This conference passed resolutions to the effect that Commonwealth intervention would be necessary in any of the following circumstances:—(*a*) at the request of the State concerned; (*b*) on account of the danger to other States, arising from the neglect of the State in which

the epidemic was, or the inability of the State complaining to take measures on its borders or otherwise for its own defence; and (*c*) on account of the neglect or refusal of the infected State to take the advice of the Director of Quarantine (evidence, p. 112).

In November, 1918, another conference was called at which were present not only departmental officers but also representatives of the British Medical Association. The occasion was the outbreak of an epidemic of influenza, and the following resolutions were passed, amongst others:—

> "3. That the chief health officer should immediately notify to the Director of Quarantine the presence of any cases of pneumonic influenza in his State, and that the Commonwealth should take steps to proclaim the State to be infected with pneumonic influenza.
>
> 4. That, upon the proclamation of any State as infected, all traffic with that State be suspended until a case breaks out in a neighbouring State, when traffic may be resumed between the infected States.
>
> 5. That, upon the proclamation of any State as infected, the Commonwealth should take complete control of all inter-state traffic both by land and sea, and that the States should render to the Commonwealth every possible aid and co-operate in the effective carrying out of the regulations" (evidence, pp. 1048-1049).

That the agreement embodied in these resolutions broke down, for whatever reason, appears from the following telegrams sent by the Acting Prime Minister to the State Premiers on the 3rd and the 6th February, 1919:—

> "Circular.—In consequence of violation of control of influenza epidemic agreement of twenty-seventh November nineteen eighteen by States of New South Wales, Queensland, Western Australia and Tasmania, Government of Commonwealth is unable to carry out arrangements voluntarily entered into by Commonwealth and States and gives formal and urgent notice that unless States which have broken the agreement indicate by noon on Wednesday fifth instant their intention to abide by it and assist quarantine authorities of Commonwealth to operate it, Commonwealth Government will renounce agreement and revert to constitutional position it occupied before agreement was drawn."
>
> "Further my circular telegram of third regarding adhesion terms Influenza Conference. Have now to advise you Commonwealth have repealed existing regulations and gazetted new regulations. Position on and after noon of Thursday 6th February will be that Commonwealth will not exercise any control over inter-state traffic by land and will completely control inter-state traffic by sea between all States. Full statement in writing following. Existing land control regulations repealed as from noon to-day and Commonwealth will no longer be concerned with land traffic until one or more States invite Commonwealth action" (evidence, p. 1050).

Department of Health. Health Council.

In 1919 in view of the conduct of the influenza epidemic, and of problems arising out of the return of large numbers of troops from the war, the question of health was referred by the Prime Minister to the Premiers' Conference. The Prime Minister then advanced tentative proposals for the establishment of a Commonwealth Department of Health. To these proposals each of the State governments ultimately consented, and the Department was created by order in council on the 7th March, 1921.

The Royal Commission on Health appointed in 1925 made a number of recommendations with regard to the administration of the Department, the more important of which were the following:—

" (*a*) A Federal Health Council should be created.

(*b*) The Commonwealth Department of Health should be extended and should formulate a model outline of general principles of health administration, should establish further divisions to investigate Australian problems and advise as to methods to be adopted.

(*c*) Health administration should be developed by the creation of health districts each in charge of a whole time district health officer.

(*d*) The constitutional power to legislate for the control of foods and drugs should be transferred by the States to the Commonwealth " (evidence, p. 114).

The conference of Ministers of Health held in 1926 adopted the general principle that a Federal Health Council should be established. That Council was established on the 23rd November, 1926, and met for the first time on the 25th January, 1927.

Co-operation of State and Federal authorities.

The manner in which State and Federal authorities have co-operated before and since the establishment of the Department of Health and the Health Council is described in the evidence of Dr. Ramsay Smith (pp. 1046-1051) and in the report of the Royal Commission on Health (p. 16). The following extract is from that report:—

" *Co-operation in regard to Quarantine.*

4. The Constitutional powers of the Commonwealth with regard to quarantine were exercised by the passing of the *Quarantine Act* 1908. In the years immediately following, co-operation took the form of the State Departments of Health carrying out the provisions of the Quarantine Act under the direction of the Director of Quarantine, the Chief Medical Officer of the State Department of Health acting as Chief Quarantine Officer in the State concerned. The State Governments were paid a certain sum for the services of the officers carrying out the work. Similar arrangements were made with respect to animal and plant quarantine, and these, with certain modifications, are still in existence. Evidence before the Commission showed that with regard to animal quarantine the Commonwealth could now be of greater assistance by providing an expert in veterinary science at the head of a

Veterinary Quarantine Division of the Commonwealth Department of Health, who, among other duties, could advise its officers in the States. As these officers at present are also State officials, such an arrangement would be an extension of co-operation between the Commonwealth and States.

The system under which officers of the State Health Departments carried out quarantine work has (except in the case of Tasmania) been discontinued for some years. The Act is now administered, so far as human or general quarantine is concerned, by a permanent Commonwealth officer and staff stationed in each State (except Tasmania) as a branch of the Commonwealth Department of Health. Consequently, co-operation has since had to proceed on different lines, and, on the whole, it has been successfully maintained. It has, however, failed under the stress of epidemics as in that of small-pox in 1913 influenza in 1919, and plague in 1921. Although the Commonwealth Quarantine Act has now been amended (s. 2A (1.)) by the introduction of a provision which will diminish the danger of a recurrence of some of such difficulties, the necessity still continues for the most complete co-operation possible between the Commonwealth and the State Health authorities in times of threatened epidemics. We think that the position of the Commonwealth Department of Health in regard to the performance of its functions would be more clearly defined if the Quarantine Act were further amended by the addition to section 11 at the end thereof of the words 'and in promoting public health'.

Co-operation in regard to other matters.

5. In those matters affecting health of which the States have sole control, evidence has been submitted that a considerable degree of co-operation has existed between the Health authorities of the Commonwealth and States. They have combined in an investigation into hookworm over the whole of Australia and in promoting measures for its eradication where found to be present. They have similarly acted in co-operation in the campaign against venereal diseases, by the Commonwealth providing subsidies to the States for expenditure on venereal disease. Conferences of Commonwealth and State Health and other officials have been held to devise uniform legislation and regulations with regard to purity of food and drugs, and to devise measures for uniformity in the action to be taken against tuberculosis. While these and other conferences have been of considerable value, great delay has frequently occurred in giving effect to their recommendations. In some instances the recommendations have not been fully carried out.

The Commonwealth Department of Health has also co-operated with State Departments in the fields of industrial hygiene and sanitary engineering, by providing experts in these subjects, who have advised health and municipal authorities in various States in regard to particular problems. It has also instituted laboratories which have been of great assistance, not only to State Health authorities, but to members of the medical profession in their activities in preventive medicine."

The Commonwealth has assisted or co-operated with the States in establishing serum laboratories and other laboratories at different centres for the assistance of local practitioners, a School of Public Health and Tropical Medicine, and various clinics. The Commonwealth authorities have also conducted or co-operated in conducting investigations into various diseases, including diseases associated with mining and with tropical areas, and has spent the sum of £100,000 in the purchase of radium and the establishment of a radium bank.

At the conference of Commonwealth and State Ministers held at Canberra in May, 1929, the Prime Minister drew the attention of those present to the important effect on public health of the extension of effective water and sewerage systems, particularly in country districts, and suggested that if the States would come forward with a proposal, after investigation, to assist local bodies in paying the interest on approved schemes, the Commonwealth would be prepared to consider favourably the idea of associating itself with the States in this financial arrangement in order to encourage the installation of such systems.

External Relations.

The Commonwealth is a contributor to the International Office of Public Health at Paris, and is a party to the Venereal Diseases Convention, and to the International Sanitary Convention. The Commonwealth is also a member of the League of Nations, which has established a Health Organization, and the Director-General of Health for the Commonwealth is an assessor to the Advisory Committee of the Health Organization of the League.

The Commonwealth is a party to conventions of the League of Nations relating to social hygiene, and it has been suggested that the Parliament could make these conventions binding throughout Australia by the exercise of its powers to make laws with respect to external affairs, but no legislation of this nature has been introduced, and the Commonwealth as a federation is not bound to introduce such legislation.

Control of Health.

The States retain exclusive control of local government administration, and of purely preventive measures. It was urged by witnesses that the States are financially unable to discharge adequately the responsibility which is left to them of safeguarding the health of the people. This statement was made with regard to all the States, with the exception of Victoria, as to which State no evidence on this point was placed before the Commission. It appears that the States have been unable to appoint full time medical officers outside the large cities, and this disability has been brought under the notice of successive governments in New South Wales. It was said of Western Australia that the buildings and equipment were deficient. In Tasmania the Chief Health Officer was a layman.

It was suggested by a departmental committee appointed by the Commonwealth Government in 1916 that an enormous impetus would be given to progress if the Commonwealth Government would offer to contribute to the cost of appointing district medical inspectors throughout Australia, and the suggestion was made by several State officials

before this Commission that the Commonwealth should pay a portion of the salaries of State district health officers either instead of or in addition to establishing laboratories for research.

The Commonwealth in some instances does make grants to the States for a named work, *e.g.*, for the treatment of venereal disease, and then as a condition of the grant has the right of inspection.

It was suggested by Dr. Cumpston that the Commonwealth Parliament might be invested with a concurrent health power, and that this power might either be unqualified or be restricted to acting in aid of the States, as the successful exercise of the power would of necessity depend upon agreement between the Commonwealth and the States as to their relative spheres of legislation and of administration. The following extract is from pp. 116-117 of his evidence:—

> "It has already become apparent, even at the first session of the Federal Health Council, that there is hardly a single aspect of public health which does not for its proper consideration require to be studied in its national phases. Reference to the resolutions of the Federal Health Council will show that most of the principal matters were referred to the Commonwealth Department of Health for general inquiry and the formulation of basic principles. This decision was reached owing to the conviction present in the minds of each of the State representatives that hardly a single aspect of public health administration could be considered as a matter which concerned one State only. It was obvious that, for a proper study of the conditions surrounding each of the public health problems, a national inquiry was necessary. It was also obvious that some form of central co-ordination in practice was essential to success. There would appear to be some grounds for the proposal that the Commonwealth might be invested with constitutional powers in respect of health. This would not of course remove the difficulty that is always to be found in the domain of concurrent powers. It might be difficult to define the limits of activity or of authority either of the Commonwealth or of the State in any constitutional or legal form. This would need to be a matter for adjustment and arrangement, but if the Commonwealth had powers to legislate in respect of those matters which it was agreed with the States were proper fields in which the Commonwealth should legislate, there would be the opportunity of removing many anomalies and many difficulties which now exist, and there would certainly be presented the possibility of progress to a degree which is not now possible. The Federal Health Council, if given statutory status, would provide an instrument adequate to secure agreement as to the fields in which the Commonwealth should legislate.
>
> The position might be met thus:—Section 51 of the Constitution might be amended by the addition of the single word 'health' without qualification, the exercise of this power by the Commonwealth to be dependent (as of necessity it must be for success) upon agreement between the Commonwealth and States as to relative spheres of legislation and of administration; or by the addition of the word 'health, with some qualifications indicating that the activity by the Commonwealth should be in aid of the States and not exclusive'."

Federal control was also urged by Dr. Harvey Sutton, who was then Principal Medical Officer, Department of Education, New South Wales, and is now Director of the School of Public Health and Tropical Medicine, and who contemplated a system under which such matters as the control of water and sewerage would be in the hands of a local authority, while things which concerned the State as a whole would be dealt with by the State, and things of national importance would be dealt with by the Commonwealth but chiefly through the States (evidence, p. 1224). Mr. Tudor, Secretary for Public Health, Tasmania, expressed himself as being strongly in favour of the Commonwealth having general legislative powers in regard to health on the ground that its financial and other resources would materially assist the States to deal with various health problems common to the whole of Australia and of national concern and importance (evidence, p. 895).

On the other hand a number of witnesses, including Dr. Dick, Director-General of Public Health, New South Wales, Dr. Mitchell, Acting Deputy Commissioner of Public Health, Western Australia, Dr. Ramsay Smith, Permanent Head of the Public Health Department, South Australia, and Dr. Dale, City Health Officer, Melbourne, expressed opinions against a transfer to the Commonwealth of a general health power, the more important reasons which were urged being that better results would be obtained by a continuance of the system of co-operation, and by grants from the Commonwealth to the States subject to the minimum of conditions, and that the control of health is bound up with local government (evidence, pp. 1277, 482, 1051, 707).

Foods and Drugs.

At the conference of 1904 a resolution was passed in favour of a uniform standard of foods and drugs for the Commonwealth. In 1906 an Act was passed by the State of Victoria making it possible that standards for each food should be legally promulgated, and appointing a Foods Standards Committee. Prior to 1911 similar Acts had been passed in all the States, although Tasmania did not appoint a Foods Standards Committee until recently, but it was found that the standards established were not identical in all the States. Certain of the differences were removed in 1910, and certain others in later years, but in 1927 there were still some differences (evidence, p. 121).

The Royal Commission on Health appointed in 1925 recommended uniformity in foods and drugs. The recommendation was referred, through the Federal Health Council, to the fourth conference of the Commonwealth and States on that subject, which met in May, 1926. The conference recommended that the Parliaments of the States should empower the Parliament of the Commonwealth to legislate so as to provide that the standards and regulations framed by the conference in relation to the control of imported foods and drugs, and of such foods and drugs of Australian origin as are or may be the subject of interstate trade, be made uniform throughout the Commonwealth.

It was proposed by the Acting Prime Minister of the Commonwealth that if the proposed legislation were passed, there should be a Commonwealth Foods and Drugs Standards Committee with sub-committees, but the proposal has not yet been accepted by all the States.

Registration.

At present there is no Commonwealth register of doctors, dentists, pharmacists, or nurses, nor has the Commonwealth power to establish such registers. It is said that inconvenience may arise and has arisen through a doctor registered in one State being unable to sign a death certificate in another, and through a nurse from a State in which there is no State register being unable to obtain registration in England, whereas a nurse from a State in which there is registration may do so.

The period of training for the medical profession throughout the States is not uniform, but at present the qualification accepted in one State is accepted in all, though separate registration is necessary.

At the conference of Commonwealth and State Ministers held at Canberra in May, 1929, the Federal Minister for Health raised the question of the desirability of a grant of power by the States to the Commonwealth to enable the Commonwealth to have control of the registration of medical practitioners for Australia. It was agreed that the subject be again referred to the Federal Health Council with a request that that body make a definite recommendation on the question. The Premiers undertook to give early consideration to any recommendation of the Council on this subject and to communicate at once to the Commonwealth their views thereon.

XVIII.—CO-OPERATION BETWEEN THE COMMONWEALTH AND THE STATES.

Co-operation.

Since the Commonwealth Government exercises a limited authority over the whole of Australia, and since the States within their own areas exercise those powers which have not been transferred to or have not been exercised by the Commonwealth, it has been found necessary to devise means of co-operation between one or more States and the Commonwealth, or between the States themselves. This co-operation has taken a number of different forms.

The Commonwealth in the exercise of its powers has made laws which are passed on the understanding that they will remain in force for an agreed period. Examples of such laws are (*a*) the *Surplus Revenue Act* 1910, which provided for *per capita* payments to the States for a period of at least ten years; and (*b*) the *Financial Agreement Validation Act* 1929, which gave legislative effect to an agreement of which one of the terms is that it may be varied only by the unanimous consent of all the signatories.

The *River Murray Waters Act* 1915-1923 was passed for the purpose of carrying out an agreement between the States of Victoria, New South Wales, South Australia, and the Commonwealth, by which a settlement was arrived at of a problem which at the establishment of the Commonwealth seemed likely to lead to prolonged litigation between the States named.

The *Grafton to South Brisbane Railway Act* 1924-1926 provided for an instalment of a uniform gauge railway, and for the construction of a railway with the consent of the States through whose territories it is laid.

The Sugar Agreement. Tasmanian hops.

The Commonwealth has entered into agreements from time to time with the State of Queensland whereby in consideration of the importation of foreign sugar being prohibited the Queensland Government agreed (*a*) to acquire under the Queensland Sugar Acquisition Act all raw sugar manufactured from sugar cane grown in Queensland; (*b*) to purchase all raw sugar manufactured from sugar cane grown in New South Wales; (*c*) to sell refined sugar, and other products manufactured from the raw sugar, for consumption in Australia at prices not exceeding the various prices fixed by the Commonwealth Government, a lower price being fixed for sugar used in the manufacture of fruit products; (*d*) to supply sugar for use in the manufacture of goods intended for export at the Australian in-bond equivalent of the world's sugar parity; and (*e*) to accept responsibility for any loss arising from the exportation of surplus sugar from Australia. The manner in which such an agreement is carried out is explained at page 321 of the evidence. There is no provision for such an agreement in the Constitution, but the sanction of the agreement is to be found in the power of the Commonwealth to remove the prohibition on the importation of cane sugar, beet sugar, golden syrup, and treacle, imposed by proclamation under section 52 (*g*) of the *Customs Act* 1901-1925.

By similar use of the customs power, provision has been made for the use of a specified proportion of Tasmanian hops by brewers.

Officials engaged on similar work.

Co-operation takes place between officials engaged on the same or similar work, *e.g.*, as between Commonwealth officials engaged in classing goods for export and State officials engaged in examining goods for domestic consumption. This co-operation has at times proved unsatisfactory, especially in relation to the grading of butter, and it has been suggested that the time of Commonwealth officials might be employed in giving instruction at periods of the year when the export trade is not active.

Conferences and agreements.

Conferences of departmental officers have been held, occasionally but not always under the presidency of the Ministerial head. Of these conferences, among the most important have been those between Health officers, which are referred to elsewhere in this report.

Conferences between Railways Commissioners and railway officials have been held from time to time. In 1905 a conference between the Railway Commissioners of the States arrived at an agreement for the abolition of freight rates designed to attract trade from its natural outlet. These rates were much discussed at the Federal Conventions, and provision with respect to them is made in sections 102 and 104 of the Constitution (*see* section xx of this report).

Conferences have been held between officers of the Defence Department and the Chief Railway Commissioners of the States, and in 1911 brought about the War Railway Council, on the recommendation of Lord Kitchener.

There have also been (*a*) conferences between the departmental heads of the Departments of Fisheries, intended to secure uniformity in the regulations; (*b*) conferences between heads of the Departments of Navigation in the Commonwealth and in the States, designed to prevent overlapping while preserving the separate existence of Federal and State departments; and (*c*) conferences between Forestry Officers for the purpose of considering matters of mutual interest.

Conferences of taxation and mining officials have been held recently on the recommendation of the Development and Migration Commission to consider the position of the gold-mining industry. At the conference of Commonwealth and State Ministers held in May, 1929, the representatives of the States undertook to give favourable consideration to the proposals made by this conference on the questions of uniformity of mining laws and relief in the direction of taxation.

At the same conference it was agreed that there should be a meeting of the State authorities dealing with unemployment and a representative of the Development and Migration Commission to endeavour to draft a uniform plan for labour bureaus and to propose uniform methods of administration. It was further resolved that there should be a conference of the Surveyors-General of the States with a representative of the Defence Department in order to facilitate the preparation of survey maps.

At the same conference the representatives of the States approved of the principle of the establishment of a Federal Transport Council as a consultative advisory body carrying out functions similar to those performed by the Federal Loan Council, the Federal Aid Roads Board, and the Federal Health Council.

Commonwealth and State departments now work together in the collection of income tax, though the Commonwealth and the State of Western Australia alone act together for the purpose of collecting land tax. In assessing estate duty the Commonwealth Commissioner of Taxation usually adopts the State valuation of personal property, and the State valuation of real property where no valuation for the purposes of Federal land tax is available.

A common electoral roll is in use in Victoria, South Australia and Tasmania, and is being instituted in New South Wales.

Commonwealth and State Statisticians co-operate in the collection of statistics, though it is only in the State of Tasmania that the State department of statistics has been superseded by the Federal department. Conferences between the Federal and State Statisticians are held at intervals. The work of collecting the census is carried out wholly by the Commonwealth. The collection of vital statistics is carried out by the States.

Cinematograph Films.

There are State and Federal authorities for the licensing of films. The Commonwealth can exercise no authority over films made in Australia, but a suggestion was made to this Commission that the Commonwealth has power to exercise complete control over the manner in which any imported films may be exhibited.

The proposal for the transfer to the Commonwealth of power to legislate with respect to the production distribution and exhibition of films is noted at pages 182-183 of this report.

Loan Council.

The Loan Council was formed in 1924, without statutory authority, for the purpose of controlling borrowing by the States and the Commonwealth, and reducing competition. For some time the State of New South Wales was not a member of the Council. The Loan Council has now statutory authority under the *Financial Agreement Validation Act* 1929.

Mail Services.

By means of subsidies or mail contracts, the Commonwealth has enabled frequent communication to be maintained with outlying settlements and thereby improved the conditions of settlement.

Repatriation.

The Commonwealth and the States have co-operated in the settlement of returned soldiers, on the land, and of munition and war-workers who left Australia under engagement with the British Government to undertake war work.

At the Premiers' Conference of 1917 the Commonwealth offered both to finance and to superintend repatriation, but this offer was rejected by the States. The arrangement then made was that the Commonwealth should take the responsibility of finding up to £500 per settler, as working capital for improvements, implements, seed, &c., an amount which was subsequently increased to £625 per settler, together with £375 per settler for resumptions and works incidental to land settlement approved by the Commonwealth.

By the 30th June, 1927, the total amount advanced by the Commonwealth to the States was £35,001,941. The amounts advanced to each State were:—New South Wales, £9,826,203; Victoria, £11,968,176; Queensland, £2,717,697; South Australia, £2,857,780; Western Australia, £5,463,782; Tasmania, £2,168,303.

At a conference of representatives of the Commonwealth and the States, held in Sydney on the 23rd July, 1927, it was shown that some of the States had incurred heavy losses, and the Commonwealth was asked to share in these losses, the States claiming that the repatriation of soldiers was an obligation of the Commonwealth. The Prime Minister thereupon reminded the conference that at the conference of 1917 the States had claimed that as they were in control of all machinery for land settlement the scheme should be controlled solely by the States. He stated that the Commonwealth had already provided about £10,000,000, and was willing to bear a further share of ascertained losses after inquiry. An inquiry has since been held and a report presented by Mr. Justice Pike (Soldier Land Settlement, 12th July, 1929).

Immigration.

Prior to the year 1920 the activities of the Commonwealth in relation to immigration consisted mainly in advertising the resources and attractions of Australia by means of exhibitions and in handbooks and newspapers. In 1920 an agreement was entered into between the States and the Commonwealth by which the Commonwealth undertook the task of recruiting and selecting immigrants, whilst the States undertook to advise the Commonwealth as to the number and classes of immigrants they were prepared to receive, and accepted the responsibility for their absorption. Prior to the year 1926 the task of the Commonwealth was carried out by the Migration Branch of the Department of Markets and Migration, but in that year it was taken over by the Development and Migration Commission.

On the 8th April, 1925, the governments of the United Kingdom and the Commonwealth entered into an agreement under which the Commonwealth Government was to raise loans for the States and issue the proceeds at low rates of interest during a limited period, and the British Government undertook to make certain contributions to the Commonwealth to assist it in making these concessions to the States. The total of the sums of money which may be raised under the agreement is to be £34,000,000, and the money is to be used for the purpose of enabling areas of land to be made available for settlement, or to enable such public works to be carried on as will tend to develop and expand settlement areas, or will enable areas already settled to carry a greater population. This agreement is now administered under the direction of the Development and Migration Commission, appointed in August, 1926, which considers and reports on any scheme proposed by a State to be carried out under the agreement. This agreement has now been signed by all the States, and a number of schemes have been proposed by States and approved by the Commission.

At the conference of Federal and State Ministers held at Canberra in May, 1929, it was [illegible] the Commonwealth should negotiate with the British Government in order to obtain an amendment of the migration agreement which, while assisting the development of Australia, would not add to its responsibilities in respect to migrants.

The Development and Migration Commission.

Besides its duties in connexion with "the migration agreement" the Development and Migration Commission is to carry out investigations on economic questions. It has examined the position of Tasmania by agreement between the State and Commonwealth Governments and has made suggestions for the improvement of primary production and internal transport in the island. In investigating the prospects of forestry in Tasmania, it has acted in conjunction with the State Conservator of Forests and has had the assistance of the Chief Forester of the Federal Territory. The Commission has also conducted investigations into the gold mining industry in Western Australia, and into the position of the dried fruit industry in Australia generally, and connected therewith an inquiry into the prospects of development in the Murray River Valley.

The Development and Migration Commission collaborates with the Council for Scientific and Industrial Research, the Council inquiring into the scientific, and the Commission into the economic aspects of the problem under investigation.

The Council for Scientific and Industrial Research.

The work carried out by the Council for Scientific and Industrial Research is in many respects similar to that carried out in the United States by the Bureau of Agriculture. A proposal was made to the Premiers' Conference in 1909 that a Bureau of Agriculture for the Commonwealth should be established, and a bill for that purpose was introduced into the Senate, but was subsequently abandoned owing to the opposition of the States. In view of the existence of Agricultural Bureaus in the several States this proposal was not renewed, but in 1916 a temporary body was formed, and in 1920 the Institute of Science and Industry was established, which in 1926 was re-organized under the name of the Council for Scientific and Industrial Research. The Council received a grant of £250,000 out of the surplus revenue of the year 1925-1926, and a further grant of £250,000 in 1927-1928. The money is to be expended in accordance with estimates of expenditure passed by both Houses of the Parliament from time to time (see the *Science and Industry Research Act* 1920-1926). The Council consists of a central body and State committees. The central body consists of three Commonwealth representatives, the six chairmen of State committees, and three members co-opted on account of their scientific knowledge. The State committees consist partly of representatives of the State governments, and partly of representatives of the Australian National Research Council and of industries. The functions of the State committees are to advise the Council, to bring up matters for investigation, and to make inquiries as requested.

At the conference of Federal and State Ministers held in May, 1929, attention was drawn by the Chairman of the Development and Migration Commission to the scope for joint action between the Commonwealth and the States "in connexion with scientific research and direction, by the provision of expert scientific personnel to be made available to the producers of the country [illegible] with animal and plant diseases and pests and also in scientific advice and direction in rural organization and production".

The aim of the Council is to place at the service of producers throughout Australia the highest ability and the most advanced knowledge obtainable, and so to reduce the cost and increase the volume of production. The Council is at present concentrating its attention on problems of primary production, including animal pests and diseases, plant pests and diseases, fuel problems, especially liquid fuel, the preservation of food stuffs, and forest products. The Council is also co-operating with the Development and Migration Commission and with representatives of the Departments of Agriculture in Victoria and New South Wales in inquiring into methods of improving the cultivation of tobacco in Australia, and is to collaborate with the Commission and representatives of the States in carrying out a geophysical survey of Australia. The members for the time being of the executive committee of the Council also act as trustees of a fund of £100,000 established for the purpose of assisting research workers and training research students (see the *Science and Industry Endowment Act* 1926).

The Premiers' Conference.

Conferences between the Premiers of the different States have been held in almost every year since the establishment of the Commonwealth. A list will be found at page 42 of the evidence. At most of the conferences a Commonwealth Minister has been present, and in recent years the Prime Minister has opened the conference.

In 1908 the government of New South Wales undertook to provide a secretariat which would act as a link between successive conferences. It was suggested in evidence before the Commission that the Premiers' Conference would be much better qualified to bring about uniformity in the laws of the different States if experts were appointed to advise the Conference, and to carry on a work similar to that which is carried on in the United States. What is described as a typical agenda for a Premiers' Conference, and was the agenda paper for the conference of May, 1923, will be found on page 43 of the evidence.

Witnesses who had attended one or more conferences on behalf of their respective States said that the value of these conferences could not be judged from the presence of the same item on successive agenda papers. The conferences may not be successful as instruments for having proposals passed into law, but they have considered or formulated agreements between one or more States which have been or are being carried into effect. In a great number of instances recommendations or resolutions of a conference have not been carried out, but in many instances suggestions have been made which have brought about legislation on the part of the Commonwealth or of one or more States.

The conferences have paid most attention to two topics—the financial relations of the States and the Commonwealth, and the problem of industrial relations. The problem of financial relations has been particularly prominent in the conferences immediately preceding the year in which a re-adjustment was to be made, that is, in the conferences immediately preceding the termination of the first ten years of the Commonwealth, and in those immediately before and after the termination of the ten year period prescribed by the *Surplus Revenue Act* 1910. The problem of industrial relations was most prominent in the year 1909, when it was thought necessary to bring about uniformity in industrial legislation, and shortly after the decision of the High Court

in 1920 in the *Engineers'* case, in which it was held that the Federal Arbitration Court could regulate the wages and hours of labour of employees in State industrial undertakings. Other important subjects considered at conferences were those of a uniform railway gauge, health and aviation.

Other conferences have been held between State and Federal Ministers, of which one of the most noteworthy was the Treasurers' Conference of May, 1914, for the purpose of considering resolutions designed to prevent competition for loans among the States.

At the conference of Commonwealth and State Ministers held at Canberra in May, 1929, it was resolved that the meeting of the Prime Minister and the State Premiers be held annually at some date in May, and that the agenda paper and any accompanying memoranda should be furnished to the States at least one month before the holding of the conference.

References to the Commonwealth Parliament under section 51 (*xxxvii*).

On several occasions agreements have been made, principally at Premiers' Conferences, to submit to the State Parliaments proposals to refer subjects of legislation to the Commonwealth Parliament, with the object of bringing about uniformity. Doubts have been expressed as to the effect of paragraph (xxxvii) of section 51 of the Constitution—(*a*) whether reference may be made in general terms, or only in the terms of a special Act; and (*b*) whether a reference once made may be withdrawn. These doubts have never been tested, as no reference to the Commonwealth Parliament by all the States simultaneously has ever been made.

In 1906 a proposal was made at the Premiers' Conference that legislation on the subject of hall-marking should be referred to the Commonwealth by the States.

At the Premiers' Conference in 1909 it was agreed between the Prime Minister of the Commonwealth and the Premiers of the States that the Premiers would bring forward in their respective Parliaments legislation for referring to the Commonwealth Parliament the power of legislating on industrial conditions, so as to bring about uniformity through the Inter-State Commission. In 1912 a bill was prepared for the purpose of vesting in the Commonwealth Parliament wider industrial powers, but nothing further was done. In 1915, after the writs had been issued for a referendum the Premiers agreed to submit to the State Parliaments proposals to confer on the Commonwealth Parliament certain industrial powers for the period of the war and one year thereafter. On the withdrawal of the writs only the State of New South Wales passed the necessary Act, though bills were introduced in the other States.

A proposal was at one time made to the State governments that they should introduce legislation giving the Commonwealth Parliament power to legislate with respect to intra-state shipping and navigation, but this proposal was not acted on by any of the States.

At the conference of Commonwealth and State Ministers held in May, 1929, the Prime Minister referred to the proposal for the transfer by the States to the Commonwealth of power to legislate with respect to the production distribution and exhibition of cinematograph films

in Australia on the lines recommended by the Federal Royal Commission on Films. It was thereupon suggested by the Premier of Victoria that the Victorian Act seemed to meet what was recommended, and that the Commonwealth might consider this Act and, if thought fit, circulate it to the other States with a view to uniform action.

Aviation.

In 1920 on the motion of the Prime Minister a resolution was carried at a Premiers' conference in the following form:—

> "(1) That it is desirable that each of the Parliaments of the States should refer to the Parliament of the Commonwealth pursuant to section 51 (xxxvii) of the Commonwealth of Australia Constitution Act the matter of the control of air navigation, but so as to retain to each State (*a*) the right to own and/or use for the purposes of the government of the State air-craft operating within the State, and (*b*) the police powers of the State.
>
> (2) That it is desirable that pending the passing of legislation by the Parliament of the Commonwealth pursuant to such reference the States shall each enact regulations similar to the Imperial Act, 9 George V., ch. 3, to secure uniform legislation and regulations. That the Premier of New South Wales as executive officer be requested to draft and submit to the State governments (*a*) a bill to provide for the regulations for the control by the Commonwealth of the necessary powers in accordance with the terms of paragraph 1 of the foregoing resolution, and (*b*) a bill to provide for uniform action by the States pending the passage of Commonwealth legislation."

The Commonwealth thereupon passed the *Air Navigation Act* 1920. Four States dealt with the matter. Tasmania and Queensland passed Acts substantially in accordance with the terms of the resolution. Victoria and South Australia passed Acts on different lines. In New South Wales and Western Australia bills in accordance with the terms of the resolution were introduced but not passed (evidence, pp. 49, 270-271).

At the conference of Commonwealth and State Ministers held in May, 1929, it was agreed that the Commonwealth should draft a bill to be submitted to the governments of the States transferring to the Commonwealth Parliament full power to legislate with respect to aviation and matters incidental to aviation, and the State Governments undertook to consider whether they would submit the bill to their respective Parliaments at an early date.

Education.

The Commonwealth has no power under the Constitution to make laws with respect to education, but it may make laws for education in a Territory, and it is interested in the education of students for service in the Territories and for other purposes. The Commonwealth has, therefore, considered proposals for establishing a University in the Federal Territory, and evidence was given on this subject before the Commission by Sir Mungo MacCallum, then Vice-Chancellor of the University of Sydney, and by Professor Laby, Professor of Physics and Natural Philosophy in the University of Melbourne.

The Commonwealth has already made provision for a School of Forestry in the Federal Capital Territory, to which students are received from the States, and which will take the place of a School of Forestry formerly contemplated by certain of the States. The Commonwealth has made arrangements with the University of Sydney for the establishment of a School of Public Health and Tropical Medicine, and the building required for the School is in course of erection. The Commonwealth gives assistance to the University of Sydney by contributing a certain share of the salary of the Professor of Oriental Studies, and of the expenses of the Department of Anthropology, and has given temporary assistance for the study of aero-dynamics to the University of Melbourne. The Commonwealth has also provided a fund, to be administered through the Council of Scientific and Industrial Research, for the purpose of providing assistance to research workers and in the training of research students. Evidence was given before this Commission by witnesses who urged that the Commonwealth should have power to make laws with respect to secondary education or to education generally, and also that it should give further assistance to the States in providing for educational research, for experimental education and for other purposes, and also that a Federal Bureau of Education should be established (evidence of Dr. Cole, Vice-Principal, Sydney Teachers' College, at p. 1369, and of the Hon. E. A. McTiernan, at p. 1284).

Federal aid in the United States of America.

Under the Constitution of the United States there is no express power under which Congress may grant subsidies to States, but there are numerous instances of appropriations being made for the purpose of granting subsidies to States for specified purposes, and of conditions being prescribed as to the manner in which these subsidies may be applied. By the Morrill Act of 1862 portions of the national land were set aside for the benefit of each State in proportion to its representation in Congress, and provision was made that the proceeds of sale of this land were to be devoted to the maintenance of one or more colleges engaged principally, but not exclusively, in teaching branches of learning relating to agriculture and the mechanical arts. Later amendments of this Act went into some detail as to the management of the Land Grant Colleges, committed the administration of the law to the Bureau of Education, and empowered the Secretary of the Interior to withhold the allotment of any State which did not comply with the terms of the grant, subject to an appeal to Congress. In 1887 Congress made a lump sum appropriation to each State for the purpose of maintaining an Agricultural Experiment Station in connexion with its Argicultural College. In 1907 it increased the appropriation and laid down additional rules for the use of the money. Eight years later it established in the Department of Agriculture a State Relations Service, charged with the duty of supervising the Agricultural Colleges and Experiment Stations.

The Weeks Act of 1911 made appropriations for the purpose of enabling the Forest Service and the Department of Agriculture to co-operate with any State or group of States, when requested, in protecting the forested watersheds of navigable streams against fire. The Smith-Lever Act of 1914 made appropriations for extension work in agriculture undertaken by the Department of Agriculture and the

Agricultural Colleges of the States. A small lump sum was voted to each State, and the remainder was apportioned among the States, each receiving a share fixed on the basis of its rural population as compared with the rural population of the rest of the Union. This Act also contained the provision that Federal funds should not be given to any State, until it accepted the terms of the Act and appropriated or otherwise secured a sum equal to that allotted to it by the law. The Smith-Hughes Vocational Education Act of 1917 appropriated Federal funds to aid the States in teaching trades, industrial subjects, and home economics. The Act is carried out under the direction of a Federal Board for Vocational Education. It is now supplemented by the Purnell Act of 1925, making provision for research in home economics.

By the Federal Highway Act of 1916 large sums of money were granted to the States for public roads, and provision was made for the closest scrutiny over the construction and maintenance of such roads, the grants being apportioned among the States on the basis of population, area, and postal route mileage. This Act has been amended in the direction of giving the Federal authorities greater control over the State highways, and for the years 1928-1929 the sum of eighty-six million dollars was voted for road building.

By the Industrial Rehabilitation Act of 1920 Federal aid was provided for the purpose of restoring to civil employment persons injured in industry or any legitimate occupation, and thirty-five States have accepted the provisions of the law and begun work under Federal supervision.

By the Sheppard-Towner Act of 1921 Federal money was appropriated to the States for the purpose of promoting the welfare of mothers and infants at the time of child-birth, and this law was sustained by the Supreme Court in the case of *Massachusetts* v. *Mellon* in 1923. The general administration of the law is placed in charge of the Children's Bureau, in the Department of Labor, subject to the supervision of a Board of Maternity and Infant Hygiene (*see* Beard, American Government and Politics, 1928, 5th edn., pp. 443-447).

International Labour Conventions.

The conventions agreed upon by the International Labour Conferences at Geneva have from time to time been referred to the States by the Commonwealth Government on the assumption that to give effect to them by legislation was not within the powers of the Commonwealth Parliament, and also because under article 405 of the Treaty of Versailles the Commonwealth Parliament is entitled to treat conventions on labour matters as recommendations only.

Of the conventions so referred, some were already covered by legislation of the Commonwealth or the States, none has been dealt with specifically by any State. The subject of the conventions was discussed at the Premiers' Conference in July, 1927, and reasons were given for the inaction of the States, but no plans for the future were adopted. The subject was again discussed at the conference of Commonwealth and State Ministers in May, 1929.

The carrying out of co-operation between the Commonwealth and the States.

Generally witnesses before the Commission expressed satisfaction with the manner in which co-operation had been carried out between Commonwealth and State officials and Commonwealth and State Departments. Particularly was this the case with regard to the co-operation between the State and Commonwealth Departments of Health and of Statistics. An exception to this rule, however, was found in the relations between the officials engaged in the inspection and grading of certain commodities in the State of New South Wales. The opinion was expressed by some witnesses that in taking over functions previously carried out by the States and in assuming functions which the States were carrying out simultaneously, the Commonwealth had imposed unnecessary expense on the people of Australia. It was urged that the Commonwealth should have made more frequent use of State officials, and that instead of establishing new departments of its own it should have subsidised existing State Departments or have acted in close co-operation with them (*see* evidence of Mr. Bland, p. 1166, and for examples, the evidence of Mr. Holman, p. 1317, Mr. Eggleston, p. 731, Sir Edward Mitchell, p. 761, Mr. Drummond, p. 1228). Further it was said that in assuming functions not expressly transferred to it the Commonwealth had caused expenditure which was unnecessary and unjustified (*see* in addition to witnesses previously cited, Sir Henry Barwell, representing the South Australian State Government, p. 963, and Sir James Mitchell, p. 564), and that if Commonwealth intervention was necessary it could have taken the form of subsidies to existing State departments. It may be noted that co-operation between the Commonwealth and States in the collection of income tax has been established in comparatively recent years, and that there is still an apparently unnecessary duplication of expense in the maintenance of separate State and Commonwealth departments in some States for land tax and for electoral purposes. It should also be noted that at the conference of State and Commonwealth Ministers held in May 1929 reference was made to the prospect of more effective co-operation between the States and the Commonwealth in the application of science to primary production.

XIX.—THE FINANCIAL RELATIONS OF THE COMMONWEALTH AND THE STATES.

The financial provisions of the Constitution.

A brief account of the financial provisions of the Constitution, including the provisions which were contained in the pact of union and the provisions (s. 105A) which were inserted by the constitutional alteration of 1928, has been given in section iii of this report. Some of these provisions (*see* ss. 87, 89, the second paragraph of s. 92, ss. 93 and 95) related to specified periods, and their operation has now been exhausted, but their effect on the financial relations between the Commonwealth and the States is to be noted in an account of the working of the Constitution since Federation. The objects on which the Commonwealth may expend its revenue are to be gathered from various sections of the Constitution, and in particular from sections 51, 52, 69, 81, 82, 85, 96 and 122. Provisions relating to the payment of surplus revenue to the States, the grant of financial assistance to the States, and the making of agreements with respect to the taking over by the Commonwealth of the debts of the States and the borrowing of money by the Commonwealth and the States, are to be found in sections 94, 96, and 105A. The financial relations between the Commonwealth and the States depend on these sections and on the interpretation which has been placed on sections 94 and 96 by the Government of the Commonwealth and by the High Court.

The initial stages of Federation. The book-keeping period.

The effect of the operation of sections 89 and 92 on the financial relations of the Commonwealth and the States was only temporary and has already been indicated. These sections prescribed the means of adjustment for the period prior to the imposition of uniform duties of customs. Section 93 provided for what was called the "book-keeping" period. Under the Constitution this period was to continue for five years after the imposition of uniform duties of customs and thereafter until the Parliament should otherwise provide, and the operation of the section was continued for a further period by the *Surplus Revenue Act* 1908. During the book-keeping period the States were credited with the revenues received in the States, and debited with the expenditure of the departments transferred under section 69 of the Constitution, and also with a proportion of the expenditure of the Commonwealth on other objects. The *Surplus Revenue Act* 1908 continued the book-keeping system, but provided that revenue formerly collected by the States should be distributed among the States in proportion to their respective populations, and more particularly defined what items of expenditure should come under the heads of transferred and new expenditure respectively. The book-keeping period as extended coincided with the period of ten years mentioned in section 87 of the Constitution, during which it was provided that of the revenue derived by the Commonwealth from customs and excise not more than one-fourth should be applied by the Commonwealth towards its own expenditure, and that the balance should, in accordance with the Constitution, be paid to the several States or applied towards the payment of interest on debts of the several States taken over by the Commonwealth. During this period

of ten years the States received not only the three-fourths of customs and excise revenue, which the Commonwealth was bound to pay them, but £5,000,000 in addition; and no debts were taken over from the States.

The Surplus Revenue Act 1908.

After the end of the five-year book-keeping period the Parliament, under section 94 of the Constitution, was to "provide, on such basis as it deems fair, for the monthly payment to the several States of all the surplus revenue of the Commonwealth." Different opinions were entertained whether this section was mandatory or permissive. The Commonwealth Government adopted the practice of forming trust accounts, in accordance with the provisions of the Audit Act, and of appropriating money for the purposes of these trust accounts, so that although all the revenue of one year might be appropriated for authorized purposes, part of it might not be expended until later years. In June, 1908, the Parliament of the Commonwealth passed the *Coast Defence Appropriation Act* 1908 and the *Old-age Pensions Appropriation Act* 1908, whereby unexpended moneys were appropriated for expenditure in future years.

The *Surplus Revenue Act* 1908 provided in effect that moneys so appropriated should be deemed expenditure of the Commonwealth, so that there could be no surplus revenue until after the moneys appropriated had been added to the moneys actually expended within the year, and deducted from the revenue for that year. Doubts as to the constitutional validity of this practice were expressed in Parliament, and the Acts of the Commonwealth by which it was sanctioned were attacked before the High Court by the State of New South Wales, but unsuccessfully. The State claimed the sum of £160,000 as its share of moneys appropriated to trust accounts, but the High Court held that the Commonwealth was entitled to charge against the States the amounts paid out of the Commonwealth revenue as special appropriation (*New South Wales* v. *Commonwealth,* 7 C.L.R. 179).

Conferences. The Referendums of 1910.

Shortly after the establishment of the Commonwealth and until the end of the ten-year period prescribed by section 87, negotiations had been going on between representatives of the States and of the Commonwealth in the hope of arriving at a new adjustment by which the financial relations of the States and the Commonwealth would be regulated for the immediate future. Eleven conferences between representatives of the States were held during this period. At several, representatives of the Commonwealth were present, and at one—that held in 1906—leaders of the Opposition in the State Parliaments attended, in order to give the resolution of the States a non-party character.

In 1909 an agreement was drawn up and signed by Mr. Deakin, as Prime Minister of the Commonwealth, and by the Premiers of the States, which was in the following terms:—

"In the public interests of the people of Australia, to secure economy and efficiency in the raising and spending of their revenues, and to permit their Governments to exercise unfettered

control of their receipts and expenditure, it is imperative that the financial relations of the Federal and State Governments—which under the Constitution were determined only in part, and for a term of years—should be placed upon a sound and permanent basis.

It is therefore agreed by the Ministers of State of the Commonwealth and the Ministers of the component States in conference assembled to advise:—

1. That to fulfil the intention of the Constitution by providing for the consolidation and transfer of State debts, and in order to insure the most profitable management of future loans by the establishment of one Australian stock, a complete investigation of this most important subject shall be undertaken forthwith by the Governments of the Commonwealth and the States. This investigation shall include the question of the actual cost to the States of transferred properties as defrayed out of loan or revenue moneys.
2. That in order to give freedom to the Commonwealth in levying duties of customs and excise, and to assure to the States a certain annual income, the Commonwealth shall, after the first day of July, one thousand nine hundred and ten, pay monthly to the States a sum calculated at the rate of one pound five shillings per annum per head of population according to the latest statistics of the Commonwealth.
3. That in recognition of the heavy obligations incurred in the payment of old-age pensions, the Commonwealth may, during the current financial year, withhold from the moneys returnable to the States such sum (not exceeding six hundred thousand pounds) as will provide for the actual shortage in the revenue at the end of the said year. If such shortage amounts to six hundred thousand pounds, the basis of contribution by the States shall be three shillings per head of population in the Pension States (viz., New South Wales, Victoria, and Queensland), and two shillings per head of population in the Non-pension States (viz., South Australia, Western Australia, and Tasmania). If such shortage be less than six hundred thousand pounds, the contributions shall be reduced proportionately per head of population as between the Pension and the Non-pension States.
4. That in view of the large contribution to the customs revenue *per capita* made by the State of Western Australia, the Commonwealth shall (in addition to the payment provided for in paragraph No. 2) make to such State [illegible] annual payments, commencing at [illegible] and fifty thousand pounds in the financial year one thousand nine hundred and ten and one thousand nine hundred and eleven and diminishing at the rate of ten thousand pounds per annum. The Commonwealth shall in each year deduct on a *per*

capita basis from the moneys payable to the States of the Commonwealth an amount equal to one half of the sum so payable to the State of Western Australia.

5. That the Government of the Commonwealth bring before the Parliament during this session the necessary measure to enable an alteration of the Constitution (giving effect to the preceding paragraphs Nos. 2, 3, and 4) to be submitted to the electors."

In accordance with paragraph No. 5 of this agreement two proposed laws for the alteration of the Constitution were submitted to the electors at referendums held in 1910. By one of the proposed laws—Constitution Alteration (Finance) 1909—the alterations were to be as follows:—

"2. The Constitution is altered by inserting, after section eighty-seven thereof, the following section:—

"87A.—(1.) Notwithstanding anything in section eighty-seven of this Constitution, the Commonwealth may in the year beginning on the first day of July, One thousand nine hundred and nine, out of the net revenue of the Commonwealth from duties of customs and of excise, apply toward its expenditure for the service of that year any sum not exceeding Six hundred thousand pounds over and above one-fourth of the said net revenue.

"(2.) From and after the thirtieth day of June, One thousand nine hundred and ten, section eighty-seven of this Constitution shall cease to have effect.".

3. The Constitution is altered by inserting, after section ninety-four thereof, the following sections:—

"94A. From and after the thirtieth day of June, One thousand nine hundred and ten, sections ninety-three and ninety-four of this Constitution shall cease to have effect.

"94B. From and after the first day of July, One thousand nine hundred and ten, the Commonwealth shall pay to each State, by monthly instalments, or apply to the payment of interest on debts of the State taken over by the Commonwealth, an annual sum amounting to Twenty-five shillings per head of the number of the people of the State as ascertained according to the laws of the Commonwealth.

"94C.—(1.) The Commonwealth shall, during the period of twenty-five years beginning on the first day of July, One thousand nine hundred and ten, pay to the State of Western Australia, by monthly instalments, an annual sum which in the first year shall be Two hundred and fifty thousand pounds, and in each subsequent year shall be progressively diminished by the sum of Ten thousand pounds.

"(2.) One-half of the amount of the payments so made shall be debited to all the States (including the State of Western Australia) in proportion to the number of their people as ascertained according to the laws of the Commonwealth, and any sum so debited to a State may be deducted by the Commonwealth from any amounts payable to the State under the last preceding section or this section.

4. Section one hundred and five of the Constitution is altered—

(*a*) by omitting the words—

"and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States;" and

(*b*) by adding at the end thereof the following paragraph:—

"The interest and charges payable by the Commonwealth, in respect of the debts of a State taken over, may be deducted and retained from any moneys payable to the State under this Constitution, and shall, to the extent to which they are not so deducted and retained, be paid by the State to the Commonwealth."

By the other proposed law—Constitution Alteration (State Debts) 1909—section 105 of the Constitution was to be altered by omitting the words "as existing at the establishment of the Commonwealth".

Of these two proposed laws, Constitution Alteration (Finance) 1909 was rejected, and Constitution Alteration (State Debts) was approved.

The arrangement proposed in Constitution Alteration (Finance) 1909 would have had the effect of giving the States a permanent charge, on the whole revenues of the Commonwealth, of a fixed sum instead of the varying amount of the proportion of customs and excise revenue to which they had previously been entitled for a period of ten years. Western Australia would also have become entitled to an annually diminishing grant for a period of twenty-five years in addition to any other grant that might have been made to that State under section 96. The representatives of the States, both before and after the Conference of 1909, sought to obtain a larger share of the Commonwealth revenue than 25s. per head, and also an additional payment varying with customs receipts. When the sum of 25s. was paid under the *Surplus Revenue Act* 1910, the States were worse off than they would have been had they retained their original share of the customs receipts. An estimate of the difference between the payments actually made and the payments which would have been made, had the provisions of section 87 been continued, is extracted from the report on Western Australian disabilities (pp. cxlviii and cl):—

Financial year.	Estimated amount which would have been payable to States under section 87.	*Per capita* payments.
	£	£
1910–11	8,041,850	5,603,193
1915–16	8,551,906	6,346,995
1920–21	9,264,713	6,840,163

It should be noted, however, that in 1908-1909 the customs and excise revenue was £10,844,067, and that there was no anticipation of the great increases that afterwards took place. On the contrary some doubt

was felt whether the Commonwealth would be able to meet its obligations to the States, and although New South Wales, Victoria and Queensland were the only States paying old-age pensions at this time, it is reasonable to suppose that other States would have followed their example at no remote date. It should also be noted that the representatives of the Commonwealth and the States, in their desire to secure certainty and freedom in the management of their revenue, made no allowance for the possibilities of great changes taking place in the value of money.

Although by the referendum the Commonwealth obtained power to take over all State debts, and not only those existing at the establishment of the Commonwealth, no attempt was made to use this power, until after a further alteration of the Constitution had been carried in 1928.

Per capita payments under the Surplus Revenue Act 1910. *Special grants to Western Australia and Tasmania.*

Although the proposed law providing for *per capita* payments to the States had been rejected at the referendum, by the *Surplus Revenue Act* 1910 the Parliament itself imposed on the Commonwealth the obligation of making these payments for a period of ten years. That Act governed the distribution of Commonwealth revenue between the States and the Commonwealth until the year 1927.

The principal provisions of the *Surplus Revenue Act* 1910 were that for a period of ten years from the 1st July, 1910, and thereafter until the Parliament otherwise provided, the Commonwealth should pay to each State an annual sum amounting to 25s. per head of the people of that State (s. 4), and that during a similar period additional sums should be paid to Western Australia so that in the first year £250,000 should be paid and thereafter the payments should diminish by £10,000 per annum, half of these payments to be deducted from the payments to be made to the States (s. 5). The Act also directed, by section 6, that in addition to the *per capita* payments referred to in section 4, the Treasurer should pay to the several States in proportion to the number of their people all surplus revenue, if any, in his hands at the close of each financial year. This direction was given under the provisions of section 94 of the Constitution, as the proposed law by which that section would have been deleted had been rejected at the referendum, but section 6 conferred no practical benefit on the States, since the Commonwealth was at liberty to act on the decision of the High Court already mentioned and to appropriate the unexpended revenue of every year to one or more trust funds. The section, it may be noted, has been replaced by section 5 of the *States Grants Act* 1927, which is substantially identical and is subject to the same comment.

In 1912 Tasmania received a grant of £95,000 under an arrangement similar to that made with Western Australia, the payments to diminish by £10,000 per annum over a period of ten years. That grant terminated in 1921-1922. For 1922-1923 and 1923-1924 further annual payments of £85,000 were authorized. In 1924 an Act was passed granting Tasmania assistance of £85,000 for 1924-1925, and sums less than £85,000 by £17,000 in each of the succeeding four years. By the same Act the Commonwealth gave Tasmania Federal income tax on prizes in lotteries won in that State. In 1927 special payments to

Tasmania of £378,000 per annum were authorized for two years from the 1st July, 1926, and from the same date special payments to Western Australia of £300,000 per annum were authorized for five years.

During the period covered by the *Surplus Revenue Act* 1910 the participation of Australia in the war brought about a decisive change in the financial position of the Commonwealth. The Commonwealth became a borrower, on a large scale, principally from the people of Australia. It became liable to large annual payments for interest and pensions, and it became a creditor of the States for money lent for temporary purposes and for the settlement of returned soldiers on the land. At the same time the purchasing power of the sums of money paid by the Commonwealth to the States seriously diminished, and some of the States, except during a few years of the war period, borrowed on a far larger scale than previously.

The ten-year period provided for by the *Surplus Revenue Act* 1910 came to an end in 1920. Thereafter the control of the Commonwealth Parliament over the expenditure of the Commonwealth revenue was unfettered by any legal or constitutional obligation to the States—except so far as section 81 might be regarded as limiting the power of appropriation, and section 94 as directing the distribution of surplus revenue—and the Parliament's power of taxation remained unlimited. With a view to bringing the arrangement embodied in the *Surplus Revenue Act* 1910 to an end and to making a new adjustment, various proposals were made both by the States and by the Commonwealth. In 1919 the then Acting Prime Minister submitted a proposal to the Premiers' Conference that the *per capita* payments be reduced by 2s. 6d. in each year so that within a period of six years they would have fallen from 25s. to 10s. In doing so he laid stress on the great increase in the obligations of the Commonwealth since 1910-1911, not only through the war, but also through the increased amounts payable for old-age and invalid pensions, which in 1910-1911 were £1,868,000, and in 1918-1919 were £3,925,000. In 1923 proposals and counter-proposals were made on behalf of the Commonwealth and the States, which were elaborately discussed, but of which none was accepted. The Commonwealth proposals were to make an adjustment for a period of five years by ceasing to make the *per capita* payments, by abandoning income tax on all incomes over £2,000, and by making certain special payments. The State proposals were for an arrangement extending over ten years during which the Commonwealth would abandon all taxation of income, and the States all claims to a share in customs revenue, the Commonwealth to be recouped for loss of revenue in each year by the States. Later in the same year further proposals were made by the Commonwealth, including a proposal to abandon all taxation of incomes except incomes of companies, the States to cease to receive payments under the *Surplus Revenue Act* 1910, and this alternative arrangement to continue for five years. Four States accepted these proposals, New South Wales dissenting and Tasmania not being represented at the conference. These proposals and counter-proposals did not contemplate a permanent arrangement, one reason being as put forward by the Prime Minister that the customs revenue might be expected to decrease. Customs revenue, however, continued to increase until the next proposals for a financial adjustment were made and accepted.

Abolition of per capita payments by the States Grants Act 1927. *Special grants to Western Australia and Tasmania.*

By the *States Grants Act* 1927 the provisions of the *Surplus Revenue Act* 1910 relating to *per capita* payments were repealed, and in their place a direction was given to the Treasurer to make payments to the States during the financial year 1927-1928 of the amounts specified in a schedule to the Act, the amounts being those which the respective States would have received, had the *per capita* payments been continued. The Act also provided for the special payments to Western Australia and Tasmania already mentioned—£300,000 per annum to Western Australia for five years commencing from the 1st July, 1926, and £378,000 per annum to Tasmania for two years commencing from the same date.

The Financial Agreement 1927.

Prior to the passing of the *States Grants Act* 1927 protests had been made against the announced intention of Ministers to abandon the *per capita* payments, and suggestions had been made that the Loan Council, which was then in existence as a voluntary council in which the Commonwealth and all the States other than New South Wales participated, should be placed on a statutory basis, that the Commonwealth should take over the whole or a portion of the State debts, and that in order to improve the credit of the States and to meet criticisms of their indebtedness, sinking funds should be established for the liquidation of State debts. In response to the protests a scheme was prepared by the Federal Government, which was submitted to two successive conferences of representatives of the States and the Commonwealth in the months of April and July, 1927. After a number of modifications in substance and in form the scheme was accepted subject to ratification by the respective Parliaments of the States and the Commonwealth, and was set out in "the financial agreement" dated the 12th December, 1927. This agreement was subsequently approved by the Parliaments of all the States, and in part became binding on the States and the Commonwealth until the 1st July, 1929.

Before referring to the scheme in detail, it should be stated that by the *Loans Sinking Funds Act* 1918 provision was made for the establishment of a loans sinking fund for the Commonwealth by the payment into a trust fund of 10s. per annum for each £100 of the public debt of the Commonwealth to be used in re-purchasing securities issued by the Commonwealth and in repaying loans. This Act was superseded by the *National Debt Sinking Fund Act* 1923, subsequently amended in 1924, 1925, 1928 and 1929, which established the National Debt Commission consisting of the Treasurer of the Commonwealth, the Chief Justice of the High Court, the Governor of the Commonwealth Bank, the Secretary to the Treasury, and the Solicitor-General. By this Act the National Debt Sinking Fund was established, and the Treasurer was directed to pay into the Fund in each financial year for a period of fifty years, *inter alia*, a sum of £1,250,000, and a sum of 10s. for each £100 of the net debt created in that year and in any financial year prior thereto and after the 30th June, 1923, together with certain capital sums repaid to the Commonwealth by way of

redemption of loans made by the Commonwealth, and also the reparations received under the Peace Treaty. Under the amending Act No. 19 of 1928 moneys received by the National Debt Commission in pursuance of the financial agreement are to be paid into the Trust Fund under the head of the National Debt Sinking Fund and applied in accordance with that agreement.

Constitution Alteration (State Debts) 1928.

After the financial agreement had been approved by the States and the Commonwealth, a proposed law for the alteration of the Constitution was submitted to the electors at a referendum and was approved by the requisite majorities. The new power which is introduced into the Constitution is in the following terms:—

105A.—(1.) The Commonwealth may make agreements with the States with respect to the public debts of the States, including—

(*a*) the taking over of such debts by the Commonwealth;
(*b*) the management of such debts;
(*c*) the payment of interest and the provision and management of sinking funds in respect of such debts;
(*d*) the consolidation, renewal, conversion, and redemption of such debts;
(*e*) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and
(*f*) the borrowing of money by the States or by the Commonwealth or by the Commonwealth for the States.

(2.) The Parliament may make laws for validating any such agreement made before the commencement of this section.

(3.) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

(4.) Any such agreement may be varied or rescinded by the parties thereto.

(5.) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto, notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

(6.) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section 105 of this Constitution.

The Financial Agreement Validation Act 1929.

The agreement, which was validated under section 105A by the *Financial Agreement Validation Act* 1929, is divided into four parts. The first part defines the meaning of net public debt and gross public debt of a State existing on the 30th June, 1927, and the amount of each is set opposite the name of each State in the agreement. The net public debt does not include (*a*) the amount of the State debt for which the Commonwealth makes itself responsible as the equivalent of the value of "transferred properties" taken over from a State, *i.e.*, properties which became vested in the Commonwealth pursuant to section

85 (i) of the Constitution; or (*b*) the amount of the sinking fund of a State. Both of these amounts are included in the gross public debt. The public debt, whether net or gross, does not include the amount of loans raised by municipal or other public bodies authorized to borrow moneys for local government or other public purposes.

The first part of the agreement also defines the powers and functions of the Australian Loan Council. The Loan Council is to consist of a representative of the Commonwealth and a representative of each State. To this Council the Commonwealth and each State is to submit from time to time a programme setting forth the amount it desires to raise by loan for each financial year for purposes other than the conversion, renewal or redemption of existing loans or temporary purposes. Any amount which it is proposed to raise for the purpose of funding a revenue deficit shall be included in the programme, but stated separately. Loans to be raised by the Commonwealth for defence purposes are not to be included in the programme, nor are they to be otherwise subject to the agreement. The Commonwealth and each State are also to forward to the Loan Council during each year a statement of the amount which each requires for the conversion, renewal or redemption of existing loans. The Loan Council is to decide whether the amount required under either of these submissions can be borrowed at reasonable rates and under reasonable conditions. If it cannot arrive at a unanimous decision, the Commonwealth is to be entitled to borrow at least one-fifth of the amount to be borrowed under the first submission, and each State is to be entitled to an amount which bears the same proportion to the balance of that amount as the total of the net loan expenditure of the State during the preceding five years bears to the total net loan expenditure of all the States during the same period. In arriving at any decision the member representing the Commonwealth has two votes, and a casting vote, and the members representing the States one vote each. The amounts to be borrowed may be raised either by one loan or by more than one loan. The Commonwealth is to arrange for all borrowings, including borrowings for conversion, renewal, redemption, or consolidation of existing loans, except where the Loan Council by unanimous decision has decided that a State may borrow money outside Australia in the name of the State, in which case the Commonwealth is to guarantee the performance by the State of all its obligations to bond-holders in respect of the money so borrowed.

Subject to the maximum fixed by the Loan Council, each State may borrow within the State, the securities, except when the borrowing is for temporary purposes only, being Commonwealth securities, and the Commonwealth may borrow within the Commonwealth, subject to the same restrictions. The agreement does not apply to municipal or other public bodies authorized to borrow moneys for local government or other public purposes.

The agreement provides for a payment of interest during the period between the 1st July, 1927, and the 1st July, 1929, and also during the period covered by the agreement subsequent to the 1st July, 1929.

During the temporary period the Commonwealth pays to each of the States two amounts which are fixed, the first being an amount equivalent to the amount of the *per capita* payment to that State for

the 1926-1927 period, the second being interest at the rate of 5 per cent. (in lieu of the 3½ per cent. previously paid) in respect of the value of the properties transferred to the Commonwealth by that State. During the same period contributions are to be made to the National Debt Sinking Fund by the Commonwealth and the States in respect of loans contracted before the 1st July, 1927—the contributions being 7s. 6d. per annum for each £100 of the net public debts of the States, of which the Commonwealth contributes 2s. 6d. and the States 5s.—and in respect of loans contracted after that date, the contribution being 10s. per annum for each £100 of the loan, of which the States contribute 5s. and the Commonwealth 5s. These contributions are not to be made in respect of a loan raised for the purpose of funding a deficit. Where a loan is raised for that purpose, the State raising the loan has to contribute 4 per cent. per annum to a sinking fund and the Commonwealth contributes nothing. In some cases States had contributed larger sums than 7s. 6d. for the redemption of old loans. In such cases the amount in excess of the 7s. 6d. was to be paid for the future out of the National Debt Sinking Fund.

Part III. of the agreement is headed "permanent provisions". It was to come into force on the 1st July, 1929, provided the constitutional amendment had been made and a law had been passed by the Commonwealth Parliament validating the agreement. Under it the provisions relating to the temporary period are to apply to the whole period of 58 years, with certain necessary exceptions and additions. It includes provisions for the States paying to the Commonwealth any amounts payable as interest on loans which are in excess of the fixed payments, and giving a general indemnity to the Commonwealth in respect of interest on money borrowed on behalf of the States. It also contains provisions for increased contributions by the States in respect of loans which are to be redeemed within a shorter period than 53 years and are to be expended on wasting assets.

Part IV. provides for the payment by the States to the Commonwealth of the expenses of loan flotations, for the alteration of the Constitution, and for the indemnity above-mentioned.

The constitutional alteration, the terms of which are set out in the agreement, was approved at a referendum held on the 17th November, 1928. By the *Financial Agreement Validation Act* 1929, assented to on the 18th March, 1929, the agreement was brought into force for the full period of 58 years, and special provision was made for those States which had created sinking funds on such terms that they could not be transferred to the National Debt Commission. By the *National Debt Sinking Fund Act* 1929 it was further provided, in deference to a resolution passed by the Loan Council, that the States should be represented on the National Debt Sinking Fund Commission by a representative chosen by themselves.

The effect of the Financial Agreement on the finances of the States.

The effect of the operation of the agreement on the finances of the States has been variously estimated. Assuming that the population of the whole of Australia increases at the rate of 2 per cent. per annum, then it is clear that the States will for portion of the time covered by the agreement receive more than they would have received if the *per capita* payments had been continued, and thereafter less. The

length of this period must depend in some measure on the extent of the future borrowings on behalf of the States, since under the agreement a sinking fund is to be maintained for the redemption of all loans and the Commonwealth contributes to this sinking fund the sum of 5s. per annum for each £100 of all loans raised.

It was estimated by the Commonwealth Statistician, Mr. Wickens, that at the end of the first fifteen years covered by the agreement the States will have received a total sum of £1,800,000 more than they would have received had the *per capita* payments been continued, but that the period at which the annual payments would be less than the sum which would have been received had the *per capita* payment been continued, would begin before the expiration of ten years from the date of the agreement and would continue until the end of the 58-year period. Professor Copland, Professor of Commerce in the University of Melbourne, came to substantially the same conclusion, and Mr. Chapman, Under-Secretary to the Treasury of New South Wales, expressed the opinion that the payments under the agreement would be less than the *per capita* payments in 1935.

Assuming an annual increase of 2 per cent. in the population of Australia, it was said that some States would benefit at the expense of others, since it was probable that in some States the annual increase would be more than 2 per cent., and in some States less. It was claimed that in Western Australia the annual increase was likely to be more than 2 per cent. because of the prospect of pastoral and agricultural expansion in that State, and that in any State the rapid increase of population following a mining discovery might render the uniform basis unfair. The force of this criticism was admitted by some witnesses, but the comment was made that an increase of the population engaged in agricultural or grazing pursuits must be followed by some increases in the manufacturing centres, and that rapid rural development must cause heavy borrowing.

The agreement has also affected the States unequally because some States have made a practice of paying annual contributions to sinking funds, and some have not. The State of New South Wales will in the future make an annual payment to sinking fund of £700,000 a year which it has not made in the past; the States of Western Australia and Victoria will probably make smaller payments than they have made in the past.

The agreement makes no express provision for new States, but could be amended by the unanimous consent of all parties, if a new State were formed out of an existing State.

The agreement has been criticized on the ground that by reason of the pecuniary obligations assumed by the Commonwealth little scope is left for the assumption of further liabilities such as would be involved in the payment of widows' pensions or child endowment. The answer made to this criticism by one witness was that the Commonwealth Parliament could increase the income tax.

The agreement has also been criticized on the ground that, as it does not apply to municipal or other public bodies, the Loan Council will be unable to put any check on borrowing by such bodies.

The agreement curtails the power over the distribution of its revenue which was left to the Parliament by the Constitution, and it

puts a check on the power of the Commonwealth to borrow money. It also puts a check on the power of each State to borrow for its own development, and places it under a constitutional obligation to maintain a sinking fund. The agreement also marks a constitutional innovation since it gives some control over the loan policy of the individual States to representatives of all the States and of the Commonwealth, whose decisions are not subject to ratification by their respective Parliaments.

A copy of the agreement is printed in Appendix B.

Expenditure under section 81 *of the Constitution.*

Reference has already been made to the interpretation placed by successive Commonwealth Governments on section 81 of the Constitution. A list of Acts by which money has been appropriated and of items in annual Appropriation Acts, which Acts and items may depend for their validity on this interpretation, was supplied by Sir Robert Garran, and is given at pp. 1721-1722 of the evidence (*see* also pp. 69-71). The list of Acts is as follows:—

Precious Metals Prospecting Act 1926.
Petroleum Prospecting Act 1926.
Oil Agreement Act 1920, 1924, 1926.
Science and Industry Research Act 1920-1926.
Science and Industry Endowment Act 1926.
Development and Migration Act 1926 (Development).
Maternity Allowance Act 1912-1926.
Australian War Memorial Act 1925.
Commonwealth Shipping Act 1923.
Queen Victoria Memorial Act 1905.
Sugar Purchase Act 1915, 1917, 1920.
Sugar Purchase Act (*No.* 2) 1920.
Westralian Farmers Agreement Act 1920, 1921.
Wheat Pool Advances Act 1923.
Zoological Museum Agreement Act 1924.
Coronation Celebration Act 1902 (No. 3).
Belgian Grant Act 1914.

The list may require some additions, *e.g.*, the *Victorian Parliament House Memorial Act* 1927, by which the sum of £50,000 was appropriated for the provision of a permanent memorial to commemorate the occupation by the Parliament of the Commonwealth of the Parliament House of Victoria prior to the removal of the Parliament to the seat of government, and the *Geophysical Survey Act* 1928, by which the sum of £20,000 was appropriated for the purpose of conducting in Australia a comprehensive test of various geophysical methods of prospecting for minerals, metals, oil and water. It may also be the fact that some of these Acts could be defended by reference to one or more of the express powers conferred by the Constitution.

It has been suggested that the Commonwealth Parliament by the appropriation of money under section 81 could introduce a scheme of child endowment for the whole of the Commonwealth. This question is discussed in the report of the Royal Commission on Child Endowment at pp. 10-12 and the opinions of counsel are there given (*see* section xiii *supra*).

None of the appropriations made on the authority of section 81 has as yet been attacked in the Courts. It may be an explanation of this

immunity that in many cases it may be impracticable for a State to act as a plaintiff in an action to restrain the Commonwealth from expending money under an appropriation not connected with one or more of its enumerated powers, and that the Attorney-General of the Commonwealth would be justified in refusing his *fiat* to commence an action on the relation of a citizen or a State.

Apart from any question connected with section 94 of the Constitution, the use made or to be made by the Commonwealth of this power, actual or assumed, has affected or may affect the States (*a*) by relieving them of necessary expenditure, and increasing production through the application of scientific methods and the development of new industries as the result of investigation and research conducted by the Commonwealth; and (*b*) by depriving the States of experts attracted away from their service by the offer of higher salaries. While it is too soon to assess the value to the States of the scientific work which has already been undertaken by the Commonwealth, it was not disputed that the advice of experts employed by the Commonwealth had been and was likely to be of great benefit to the States, though the suggestion was made that better results would be obtained if the Commonwealth subsidised State officers or co-operated in work undertaken by the States.

The effect of Federation on State Finance.

The effect of Federation on State finance has been investigated in relation to the States of Western Australia, Tasmania and South Australia on behalf of the Commonwealth, and in each instance a statement of the position of the State was made by State representatives. Full and detailed evidence was given on the subject in each of these States before this Commission.

The Royal Commission on the finances of Western Australia was not unanimous in its recommendations, but was unanimous in its opinion that the finances of Western Australia had been adversely affected by Federation. Its report was presented on the 23rd September, 1925.

Sir Nicholas Lockyer, whose report on Tasmania was presented on the 19th May, 1926, said:

> "It appears to be also certain that Tasmania has suffered more than any other State by the direct and indirect influence of Federal policy. The State not only has been unable to share in the remarkable prosperity which has been so marked a feature in regard to Australia generally during the period covered by the Federation, but to an increasing extent each year she lags behind her more fortunate sister States. The most convincing evidence of this is the very regrettable serious annual loss of population. The accumulating effect of these conditions on the finances makes it less possible for the State each year to meet the common requirements of government and still less to meet what is indispensable for the development of its natural resources. Whilst the present unsatisfactory condition of the State finances is partially due to causes apart from any question of Federal policy, it is quite possible that under more favorable circumstances the excessive loan expenditure and other objectionable features in the State administration would not have been in evidence had the State been in a better position to cope with its own local difficulties."

In the report (15th March, 1929) on the finances of South Australia as affected by Federation, there is a statement of the disadvantages of Federation as claimed by certain witnesses, and of the advantages of Federation as claimed by others.

Before this Commission evidence was given in all the States that the finances of the States had been seriously hampered by the adjustment made by the *Surplus Revenue Act* 1910 upon the expiration of the ten years' term during which the States were entitled, under section 87 of the Constitution, to three-fourths of the customs revenue. Mr. Holman, who had been Premier of New South Wales for many years, stated that a series of deficits had begun with the passing of the *Surplus Revenue Act* 1910 and had continued ever since, and Mr. Eggleston complained, as did Mr. Holman, of the inability of the States to pay adequate salaries to highly qualified civil servants. Mr. Holman by an analysis of revenue and expenditure of the Commonwealth suggested an arrangement under which larger amounts might be paid to the States (*see* evidence, pp. 1316-1317, and for the comments of Mr. Wickens, Commonwealth Statistician, p. 1446).

The effect on the States of the Tariff, the Navigation Act, and Federal Arbitration Awards.

In the States of Western Australia, Tasmania, and South Australia, evidence of witnesses who complained that the working of Federation had been disadvantageous to those States was directed more particularly to the effect of the tariff, of the Navigation Act, and to a lesser degree, of Federal arbitration awards.

It was alleged that the tariff bore hardly on those States which depended mainly on primary production and did not include any large cities such as Sydney or Melbourne, that it increased the cost of production in unsheltered industries which have to compete in the markets of the world, and that the tariff did not confer the same compensating benefits in those States as it did in Victoria and New South Wales. It was alleged that the Navigation Act bore hardly on States which depend on inter-state transport over long distances, that it had deprived producers of many necessary facilities, and that it had borne particularly hardly on Tasmania, a State of which the exports are greater than the total volume of its production, and which looks to the tourist traffic for a substantial revenue. Of the Arbitration Court awards it was said that they set the same standard for all States, and a standard which a State accustomed to a low standard of expenditure would not have set up for itself.

Evidence on these points accompanied by a very careful analysis of the relevant figures was put before the Commission by Professor Brigden, then Professor of Economics in the University of Tasmania, and Professor Giblin, now Ritchie Professor of Economics in the University of Melbourne and then a Deputy Federal Statistician. The conclusion reached by these witnesses is substantially identical with that of the British Economic Mission (7th January, 1929, p. 13):—

> "We may say that we have been strongly disposed to the view that the combined operation of the tariff and of the Arbitration Acts has raised costs to a level which has laid an excessive and possibly even a dangerous load upon the unsheltered primary

industries, which, having to sell in the world's markets, cannot pass on the burden to other sections of the Australian community, and consequently as between the various States upon those, notably Western Australia, South Australia and Tasmania, which are poor in manufactures, and are principally concerned with primary productions. These States, and Tasmania probably most of all, are further handicapped by the high cost of freight in inter-state trade, which results from the operation of the Navigation Acts, along with the other causes which we have mentioned.

"We are aware that the disabilities under which these States suffer are recognized by the Commonwealth Government, and that substantial subsidies are paid by the Commonwealth to Tasmania and Western Australia, while the question of granting a similar subsidy to South Australia is under consideration; these subsidies, however, can only be regarded as palliatives of a system in which there is something amiss."

Grants to States.

It is to be observed, however, that in none of the reports abovementioned are the recommendations in favour of grants being made to States by the Commonwealth based solely on the disadvantages that those States have suffered through the unequal working of Federal laws.

The recommendations in each instance, and more particularly in the reports dealing respectively with Tasmania and South Australia, are based on the finding that the States in question are unable adequately to carry out the functions remaining to them under the Constitution, such as health administration, education and development, and the maintenance of public credit. It appears to be the fact that no test can be applied to applications for relief other than the test whether the State is in a financial position to carry out its functions, and whether it is taxing its own people at a sufficiently high rate, having in view the danger of driving producers, and particularly manufacturers and employers of labour, to other States.

One of the conditions recommended by Sir Nicholas Lockyer, in his report on Tasmania, was that taxation should be reduced with a view to arresting the flow of population from the Island, and this was done after a grant had been made by the Commonwealth Parliament.

It was suggested in evidence before this Commission that the position of three States dependent on grants from the Commonwealth Government, and the position of the State of Queensland, of which a large section of the population is dependent on the price of sugar fixed from time to time by agreement between the Commonwealth and State governments, and of other States claiming bounties and concessions, point to the advisability of appointing some independent body which will advise on such applications, and will—to repeat the phrase used by Mr. Deakin of the Inter-State Commission—be "the eyes of Parliament." In the absence of such a body there must be a danger lest, in addition to the competition between rival parties for the votes of the electors by offers of economic benefits, there should be added the possibility of competition for the votes of the States by offers of grants or of special legislation.

Main Roads and Federal Aid Roads. Wire and Wire Netting.

In addition to the grants made to the States of Western Australia and Tasmania as already noted, the Commonwealth has made grants to the States for special purposes.

The *Main Roads Development Act* 1923 authorized the payment of certain maximum amounts to each State, the conditions being *inter alia* that each State receiving a grant should spend from its own revenues an amount equal to the amount of the grant, and that before any payment was made to a State, that State should submit for the approval of the Minister a detailed plan of the expenditure of the money granted. The amounts specified in this Act were doubled by an amending Act passed in the following year. Doubts have been suggested as to the constitutional validity of this legislation, though it has been supported as an exercise of the power to legislate with respect to trade and commerce between the States, or with respect to defence.

By the *Federal Aid Roads Act* 1926 a new scheme, under which the Commonwealth should take a share in the construction and maintenance of roads, was brought into operation. By this Act the Commonwealth was authorized to enter into an agreement with the States according to a form prescribed in the schedule. The agreement recites that the Commonwealth is willing to distribute a sum of £2,000,000 per annum among the States upon a basis of three-fifths population and two-fifths area, and it also recites the amount which on that basis the Commonwealth proposes to pay to each State. The agreement then sets out the amount which each State will have to pay after becoming a party to the agreement, the basis of payment being that each State is to pay 15s. for every £1 paid by the Commonwealth. The agreement prescribes the amount of the contribution of each State which must be paid from revenue, and the amount which may be paid out of loan moneys, and prescribes that the amounts paid from loan moneys are to be covered by payments into the National Debt Sinking Fund. The agreement further provides (*a*) that the State is to maintain, to the satisfaction of the Commonwealth Minister, every road constructed or reconstructed under the agreement; (*b*) that each State party to the agreement is to submit to the Minister a programme of road construction or reconstruction; and (*c*) that a road is to be constructed by contract, unless approval is given by the Commonwealth Minister for its construction by day labour. The agreement also provides for the establishment of a Federal Aid Roads Board, consisting of the Commonwealth Minister and a Minister representing each of the States parties to the agreement, which is to meet at least once a year.

By the *Wire and Wire Netting Act* 1927 the Commonwealth Minister is authorized to enter into an agreement with the States for the purpose of enabling the States to obtain loan money from the Commonwealth to be spent in supplying wire and wire netting to settlers. The agreement is to provide for the liquidation of the amounts borrowed by means of contributions to a sinking fund, and provides that the settler obtaining the wire netting may pay for the same by instalments extending over 25 years.

All the States have become parties to the agreement under the Federal Aid Roads Act, but not all the States have become parties to the agreement under the Wire and Wire Netting Act. Objection was taken to both these agreements by witnesses before the Commission. It was said of both agreements that they were attempts by the Commonwealth to control the States in the exercise of functions which it was for them to carry out, and which they were carrying out with reasonable satisfaction. It was said of the roads agreement that it was an attempt to produce uniformity where uniformity was impossible, that one government should have the supervision and control of all roads within a State, and that that government should be the State government, if only by reason of its control over local government bodies. Further it was said that the roads agreement forced an expenditure on the States which they could not afford, and which they would not have attempted if left to themselves. In explanation of this criticism and in defence of the States it was said that no State Ministry, particularly in periods of unemployment, could resist the pressure of its political supporters to obtain money to be spent in the State when offered from a source other than the revenue or the loan moneys of the State itself, or the temptation presented by the opportunity of a new exercise of patronage.

XX.—SUBJECTS SPECIFIED IN THE LETTERS PATENT, AND OTHER SUBJECTS.

Of the ten subjects specifically mentioned in the Letters Patent the following have been dealt with in the previous parts of this report, namely:—Health (section xvii); Industrial Powers (section xvi); Inter-State Commission (section v); Judicial Power (section ix); Navigation (section xv); Taxation (section xii); and Trade and Commerce (section xiv).

The rest of those subjects—Aviation, Company Law and New States—will be dealt with in this section, together with the following subjects on which a report appears to be desirable, namely:—Aborigines, Fauna and Flora, Forestry, and Railways.

Aviation.

The existing powers.

The Commonwealth Parliament has no express power under the Constitution to make laws with respect to aviation. It has power to deal with some aspects of aviation under its power to make laws with respect to trade and commerce with other countries and among the States (s. 51 (i)), postal, telegraphic, telephonic and other like services (s. 51 (v)), and quarantine (s. 51 (ix)). A doubt has been expressed whether the terms of paragraph (vi) of section 51—"the naval and military defence of the Commonwealth and of the several States"—are wide enough to include aviation, but it has been assumed by the Commonwealth authorities that they are (*see* section xi—The Defence of the Commonwealth). It is arguable that the Parliament may bring into force international conventions or treaties relating to aviation by virtue of its power to make laws with respect to external affairs.

The International Convention.

The Commonwealth became a party to the international convention for the regulation of aerial navigation, signed in Paris in October, 1919, and in December, 1920, the Parliament passed the *Air Navigation Act* 1920, which came into force by proclamation on the 28th March, 1921. By that Act the Governor-General was empowered to make regulations for the purpose (1) of giving effect to the convention and to any amendment of the same; and (2) of control of air navigation in the Commonwealth and the Territories. The convention lays down a number of general principles relating to (*a*) the sovereignty of every Power over the air space above its territory; (*b*) the freedom of innocent passage for the aircraft of the contracting parties; (*c*) the right of each party to prohibit passage over certain prohibited areas; and (*d*) the necessity for any aircraft engaged in international flying to be provided with a certificate of airworthiness, and for each member of its crew to hold a certificate of competency. The standards of airworthiness and competency are laid down in the annexures to the convention, and are amended periodically by the International Commission for Aerial Navigation.

The Premiers' Conference, 1920.

Prior to the passing of the *Air Navigation Act* 1920 resolutions were passed at a Premiers' Conference held in May of that year that it was desirable for the States to refer to the Commonwealth the matter of the

control of air navigation, but so as to retain for each State (*a*) the right to own and use State aircraft operating within the State for government purposes, and (*b*) the police powers of the States. New South Wales, Western Australia, Queensland, and Tasmania introduced bills in accordance with this resolution. Bills introduced into the Parliaments of Victoria and South Australia limited the powers of the Commonwealth within those States to (*a*) any matter necessary for performing the obligations of the Commonwealth under the convention, and (*b*) intercourse by aerial navigation between the State and any other country or State of the Commonwealth (evidence, pp. 49, 271).

Inter-state traffic.

The Commonwealth has power under section 51 (i) to safeguard the routes used by inter-state traffic. It may, therefore, make provision for aerodromes, for emergency landing grounds, and for lights. It may by a law or regulation override a State law or regulation forbidding aircraft to approach within a specified distance of a State electricity plant (evidence, p. 283). But the Commonwealth may not have power to make uniform regulations relating to aircraft or airmen within a State, including standards of airworthiness and fitness or periodical examinations.

Defence and Civil Aviation.

The Commonwealth Parliament has legislated for defence purposes by the *Air Force Act* 1923. Civil aviation is kept entirely distinct in departmental administration from naval or military administration, but the connexion of civil aviation with defence policy is provided for by the establishment of the Air Council by regulations under the *Defence Act* 1903-1918 and the *Naval Defence Act* 1910-1918 (*see* section xi of this report).

Civil aviation is promoted by subsidies to companies which carry mails, principally in Western Australia and Queensland, and in some instances, as in the service between Perth and Adelaide, for the convenience of Australia generally; by subsidies for the training of aviators by aero clubs; and by lectures at the Universities of Melbourne and Sydney. It was generally agreed that subsidized aircraft in the sparsely settled districts of Western Australia and Queensland rendered valuable service to settlers in various ways, including carrying medicines and medical assistance.

Control of Aviation.

All the expert witnesses on this subject who appeared before the Commission were agreed that the Commonwealth should have control of aviation, and their views may be summed up in the following extract from the evidence of Captain G. F. Hughes, President of the Aero Club of New South Wales, which was expressly approved by other witnesses:—

"The very nature of aircraft and their uses, and the nature of the regulations required, make utterly impracticable, in my opinion, a control by the Commonwealth the effectiveness of which would only arise contingently on a particular class of journey being

undertaken. Where could one draw the line and decide where Commonwealth regulations began to operate? Such an arrangement would, in my view, be hazardous in the extreme, and a menace to all classes of aerial navigation. . . .

There is absolutely no other industry or means of locomotion in which control necessitates supervision of the product from the drawing board through all the processes of manufacture to the finished article, and then throughout the life of the machine. There is no means of travel which is so unrestricted by physical boundaries" (evidence, p. 163).

Company Law.

The existing power.

It is uncertain what is the exact scope of the power conferred on the Commonwealth Parliament by paragraph (xx) of section 51, but it seems certain that this paragraph was thought by the members of the Convention to confer power to pass a company law for the whole of Australia as the term company law is generally understood. The uncertainty as to the present position arises from the diversity of opinions expressed by different Justices of the High Court who took part in the decision of *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (8 C.L.R. 330), but all five Justices agreed that the Commonwealth Parliament under this paragraph has no power to make laws with respect to the creation of corporations. This decision is described by Sir Robert Garran as one of the surprises of the Constitution, and the Commission was informed that a bill for a Commonwealth Act dealing with companies had been prepared before the decision was pronounced but was subsequently abandoned (evidence, pp. 50, 692). The Commission was also informed by Sir Edward Mitchell that during the hearing of an appeal before the Privy Council some members of the Board, including Lord Haldane, expressed a strong opinion that the decision was not one which the Privy Council would accept (evidence, p. 762). So long as the decision stands, however, and so long as it is impossible to obtain advisory opinions from the High Court, it is improbable that the Commonwealth Parliament will pass a Companies Act.

State legislation.

The States have power to legislate with respect to companies and may pass Acts in identical terms, but in fact although more than twenty years have elapsed since the Commonwealth bill was abandoned, wide divergencies still exist between the Acts of the several States. The dates of the principal Companies Acts of the States are:—Queensland, 1863; South Australia, 1892; Western Australia, 1893; New South Wales, 1899; Victoria, 1915; Tasmania, 1920. It is to be noted, however, that in some of the States the date given is that of a consolidating Act. The State Acts have been amended from time to time, but they still present many divergencies, and they are still behind English legislation in the protection which they afford to the public (*see* the evidence of Mr. T. Brentnall, President of the Australasian Corporation of Public Accountants (p. 1596), though Tasmania has recently adopted some of the suggestions which were made by the committee appointed by the Board of Trade in England in 1925. An analysis of the Acts of the different States will be found

in the evidence of Mr. Fadden at page 1567. At the present time it seems probable that a uniform company law may be obtained through co-operation among the States, but divergencies may subsequently arise through amending legislation in different States.

Control of Company Law.

Among the witnesses who expressed themselves in favour of the Commonwealth Parliament having power to make laws with respect to companies, were the late Mr. Justice Higgins, Dr. Brissenden, K.C., representing the Bar Council and Incorporated Law Institute of New South Wales, Mr. Walsh, representing the Constitutional Club of Queensland, and Mr. H. B. Jackson. Apart from these legal witnesses the majority of those who spoke in favour of a Commonwealth company law were accountants, and included accredited representatives of the Australasian Institute of Secretaries, the Brisbane Chamber of Commerce, the Australasian Corporation of Public Accountants and the Institute of Incorporated Accountants of New South Wales. These witnesses urged that it was a disadvantage to investors and those engaged in the management of companies that there should be different company laws in the different Australian States, and it was urged that because of the absence of this power in the Commonwealth the laws at present in force in Australia do not sufficiently safeguard the interests of the public (evidence, pp. 1596, 1535). These arguments are summarized in the evidence of Mr. W. T. Tidex (p. 1372) :—

"(*a*) Legislation differs in every State.
(*b*) Companies carrying on business in more than one State suffer from confusion thereby.
(*c*) Registration is necessary in each State in which trading is conducted, thus restricting freedom of trade throughout the Commonwealth, and involving unnecessary duplication.
(*d*) Legal decisions in one State are not necessarily binding in another.
(*e*) Reform of the New South Wales Act, which is long out of date, has been long deferred owing to the probability of company legislation being made a Federal matter.
(*f*) There is a big disparity in the cost of registration of companies in the different States.
(*g*) The anomaly frequently exists of a company being registered in one particular State on account of the low registration fees payable there, although the whole of its operations may be confined to a different State. Moreover this virtually creates competition between the State authorities for registration fees."

The witnesses in favour of a grant of power to the Commonwealth referred to what is generally known as company law and is the subject of well-known legal text books cited as *Palmer* or *Buckley*.

Witnesses who opposed or questioned the proposed grant of power for the most part called attention to difficulties of definition or administration, and claimed that there are certain classes of corporate bodies which should not be subject to Commonwealth legislation. The views of these witnesses are expressed in the extracts from the evidence of Mr. Owen Dixon, K.C., and of Mr. Layton, Registrar-General, New South Wales, which are given below.

Representatives of the Hobart Chamber of Commerce who opposed the grant did so partly on the ground that they had been unfavourably impressed by the administration of the Federal Bankruptcy Act (evidence, pp. 950, 857).

In a statement presented on behalf of the Melbourne Chamber of Commerce the following reference was made to company law (evidence, pp. 1448-1449) :—

"Our recommendation is that the Commonwealth should have and use power under the Constitution to control the incorporation, administration, and winding up of companies, but that in other respects companies should be on the same footing as individual traders and firms in relation to their trading activities. Our reasons for this recommendation are:—

In principle the power of control over the incorporation, administrating and winding up of companies is in the general interests of the community. It is not a power which interferes with the exercise of individual rights, but is one which affords a common measure of protection to all parties. Exercise of such power should not interfere with the domestic fiscal legislation of any State, but should give the whole community adequate and common safeguard. A safeguard determinable on general lines, and administered from one source, can be more easily adjusted than where the control is divided.

On the grounds of convenience, we submit not only as between State and State, but as between any State and the outside world, trade and commerce would be materially assisted were it unnecessary for possible creditors to reconcile varying laws before engaging on business with a company. On the same ground we consider that one registration should be sufficient to enable a duly incorporated company to commence business in any part of the Commonwealth."

Objections to Commonwealth Control.

The objections raised by witnesses against conferring this power on the Commonwealth Parliament were of two kinds: (1) that it would be difficult to define the subject-matter of the power; and (2) that there would be difficulties in administration. These difficulties are summarized in the evidence of Mr. Owen Dixon and of Mr. Layton. The following extract is from the evidence of Mr. Owen Dixon, on behalf of the Committee of Counsel of Victoria (pp. 778—779) :—

"The advantages of a uniform company law are probably undeniable, but at the same time they are not very considerable. We think there is a great deal of difficulty in giving the Commonwealth power sufficient to enable it to make a uniform company law, unless it is expressed in terms which will enable the Parliament to control completely the internal management and operations of companies, the determination of what associations of persons and partnerships shall or shall not be incorporated, and indeed the whole subject of incorporation and the use of the idea of the juristic person. It may be doubted whether a power which would extend to regulating all activities and affecting all transactions so long as they were carried on, entered into or performed by companies, is a desirable one, and yet short of this it is difficult to confer power which will be sufficient for all purposes of company legislation.

It must be remembered that the starting point of existing company law is to compel the incorporation of an association of persons greater than the prescribed number formed for the purpose of carrying on a business. Any power which enables the Commonwealth Parliament to fix the number or define the purpose must necessarily extend to requiring the incorporation of any association of persons, few or many, and whatever may be the object or character of their joining together. It would be difficult to distinguish between industrial and provident societies formed under an enactment such as the *British Industries Provident Societies Act* 1893 (56 & 57 Vict. c. 39), which has been copied in Victoria (Act No. 3362), and companies. Such a society may be formed for carrying on any industries, businesses or trades, and is incorporated. Another instance is that of building societies. The incorporation of societies and associations of persons is resorted to for many purposes which cannot be divided by any line from 'company law'. The formation of a trustee company, an electric lighting company, and most companies requiring 'franchises' must be accompanied by legislation authorizing the incorporation to do what would otherwise be unlawful under the law of property or the law of civil wrongs, and this authority is usually given upon conditions involving special regulation of its affairs.

Moreover, legislation such as the Victorian *Fruit Act* 1915, section 12, shows how quasi-trading bodies with a corporate character may be authorized under various special schemes for encouraging production or industry. Once the Federal Parliament laid down conditions necessary for incorporation for trading purposes generally, most of this legislation by the States might well be considered inconsistent.

We think so many difficulties would result from an attempt to confer power upon the Federal Parliament which would be wide enough to enable it to exercise any real discretion in framing a uniform company law, that the very minor advantages derived from such a law would be far outweighed.

The fact is that 'company law' is merely a convenient description of an existing head of law, and is an entirely artificial and unnatural division of subject-matter for a legislative power.

In relation to many matters of the general law, of which this may be considered an example, it seems to us that the various parts of the Empire are in the same situation. There is no real reason why the law relating to the formation of companies, the mutual rights of members, and the general regulation *inter se* should not be uniform throughout the Empire, and this is true of the general law relating to civil rights. There has been an increasing tendency towards this uniformity. The codification of the law relating to bills of exchange, partnership, marine insurance, and sale of goods has been adopted by most of the legislatures, and in the case of copyright the Imperial Parliament as the result of an arrangement passed an Act for the express purpose of adoption by legislatures of the Dominions. This form of legislation might well be adopted in relation to many other matters, including the general rules of company law, and we suggest that the Commonwealth Parliament might be given power to adopt for the whole of Australia if it

thinks fit any legislation upon any subject which the Imperial Parliament has passed pursuant to any similar arrangement for the purpose of adoption by the legislatures of the Dominions."

The following extract is from the evidence of Mr. E. E. S. Layton, Registrar-General of New South Wales (p. 1261) :—

"Now as to the advantages of administration of the company law by the States. Firstly there is—

(*a*) Prompt incorporation. Quite frequently incorporation takes place as from the day on which the memorandum and articles are signed by the subscribers, or on the following day, notwithstanding that the actual signing of the certificate of incorporation is preceded by a close examination of the memorandum and articles and statement of capital, and careful search as to the availability of the name. The Registrar or Assistant Registrar of Joint Stock Companies, before signing the certificate, satisfies himself that the essential requisites for incorporation have been complied with.

(*b*) Convenience. Companies incorporated in this State with the exception of a very small proportion are promoted in Sydney, and the essential documents are signed here. Registration in Sydney must therefore necessarily be less troublesome than registration elsewhere. When companies are promoted and the documents signed in some part of New South Wales other than Sydney, their transmission to this city and the conduct of the incorporation is rendered easy by existing arrangements under which solicitors in country towns already have agents in Sydney. Not infrequently the documents are not in order and their rectification can now be readily secured in the majority of cases, as the subscribers and the company's solicitor are at hand. If incorporation were to be effected elsewhere, much inconvenience would ensue. It is important that the period between the search as to the availability of name (usually made by solicitors before preparing the documents) and the presentation of the documents to secure incorporation should be as brief as possible, otherwise the name may be appropriated by another undertaking and the expense of printing, &c., lost. Incorporation elsewhere than in Sydney would increase this period.

Sydney being probably the most important commercial centre of the Commonwealth, it is desirable that the documents of companies carrying on business in this State should be available for inspection here by those whose business relations with the companies necessitate inspection of the documents.

(*c*) Efficiency in existing organization. The existing organization is efficient, the staff well trained, and the correspondence is typed by officers having some acquaintance with the law and practice, and familiar with terms in ordinary use and their abbreviations. It is not thought that a newly created organization could gain similar efficiency for a number of years. The staff includes an inspector, part of whose duty it is to secure that annual returns of companies shall be promptly filed. It is now rarely necessary to prosecute companies for default in filing returns, and such information as to a company's affairs as is required by law to be filed is made available to the public as early as practicable.

If administration of the company law were handed over to the Commonwealth, it would be difficult to create an efficient organization, and to transfer the present staff would deprive the State of officers whose duties include other spheres also.

(*d*) Economy. The administration of company law is carried out by officers of wide general experience, who perform in addition many other duties. The branch, presided over by the Deputy Registrar-General in charge of the Deeds Branch, who is also an Assistant Registrar of Joint Stock Companies, embraces registration of the following—deeds, liens on crops and wool, stock mortgages, firms and firm-names, money-lenders, bills of sale and renewals and discharges thereof, newspapers, printing presses; together with numerous administrative duties arising under the relevant statutes.

It is thought that, in a separate office for registration of companies only, the restricted class of work would not justify the payment of salaries adequate to secure officers of the requisite capacity or tend to the development of such officers.

(*e*) Continuity of practice, &c. Practice under the various State Companies Acts is broadly understood by solicitors and accountants throughout the Commonwealth. While if the Commonwealth took over the administration of company law, a knowledge of the law itself would not be difficult to acquire, practice would take form gradually, and it would probably be many years before a body of practice such as necessarily exists in each of the States could be formulated. In the meantime difficulties productive of irritation would no doubt be encountered. Existing practice under the State law achieves generally the objects of the statutes so far as they are attainable in the present state of the law. It could not be said with any certainty that a new organization having the whole Commonwealth for its field would fulfil its much more difficult task. I am not aware of any country as extensive as the Commonwealth in which company law is administered by a central authority. Each State in the United States of America, and, I understand, each Province in the Dominion of Canada has its own company law. Commonwealth control would be an experiment surrounded with obvious difficulties.

(*f*) Practicability of special legislation desired by a State. While company law is administered by the respective States it is competent for any State desiring to do so to make special provision in regard to the incorporation of companies of peculiar character. An example of such legislation is the *Co-operation, Community Settlement and Credit Act* 1923. It is quite conceivable that in a sparsely populated State with tropical or semi-tropical conditions, company legislation designed to advance some industry peculiar to that State might be desired. In a closely settled State with temperate climate, special legislation to encourage some other industry peculiarly suited to that State might be thought necessary. If the administration of company law were transferred to the Commonwealth, special legislation of the character indicated above could not be readily secured ".

New States.

The establishment of New States.

A number of witnesses before this Commission contended that there is need for a revision of the boundaries of certain States, particularly of the States of New South Wales and Queensland, that it is desirable that new States be established, and that Chapter VI. of the Constitution be altered with the object of giving greater facilities for the formation of a new State to the electors of a particular area. The Commission heard evidence on the history of the new State movement in New South Wales from Mr. W. W. Killen, M.P., and from Mr. V. C. Thompson, M.P., Honorary General Secretary of the All Australia New States Movement, and Honorary General Secretary of the Northern New State Movement, who quoted resolutions of the Parliaments of New South Wales and Queensland in favour of the establishment of new States within the areas of those States respectively. The Commission also heard evidence in favour of the establishment of new States from Mr. D. H. Drummond, M.L.A., and Mr. W. C. Cambridge, President and Secretary respectively of the Farmers' and Settlers' Association of New South Wales, and from representative and individual witnesses at Armidale, Rockhampton, and Townsville. Evidence was not heard on the merits of any particular proposal or on the desirability of forming a new State in any particular area.

Suggested alterations of Chapter VI. of the Constitution.

Mr. R. Windeyer, K.C., and Mr. V. C. Thompson each submitted proposals for the alteration of Chapter VI. Those submitted by Mr. Thompson included resolutions passed by the Riverina New States Movement in 1922, proposals of the Northern New States Movement, and proposals drafted by Mr. Latham, K.C., for giving effect to those views.

The following provisions, in substitution for Chapter VI., were submitted by Mr. R. Windeyer (evidence, pp. 216-217) :—

> "121. Whenever the Parliament of any State has declared that any defined area within its boundaries should be established as a new State, and has enacted laws whereby the terms of separation of such area from the parent State have been determined, and laws making provision whereunder the form of constitution of such a new State has been formulated and subsequently approved of by the majority of the electors of the Commonwealth resident within such area voting on referendum, on notification by the Governor of the parent State to the Governor-General of the fulfilment of these conditions, he shall proclaim such area as a State of the Commonwealth, and such new State shall have all the status, rights, privileges and liabilities of the original States of the Commonwealth.
>
> 122. The Parliament may establish new States within the area of territory surrendered by any State to and accepted by the Commonwealth or of territory placed by the King under the authority of and accepted by the Commonwealth or otherwise acquired by the Commonwealth.

122A. The Parliament may make laws for the government of such territories as are referred to in the next preceding section until they become States or portions of States.

123. The Parliament of the Commonwealth may independently of the action of the Parliament of any State establish and admit to the Commonwealth new States from within the area of an existing State or States whenever—

(*a*) twenty per cent. of the electors resident within a defined area of a proposed new State have petitioned the Governor-General for such establishment and admission; and

(*b*) the Governor-General has made provision for the summoning of a convention elected by the electors resident within such area and the appointment of a president thereof; and

(*c*) such president has transmitted to the Governor-General a draft constitution for such new State together with proposed terms of separation from the parent State or States, certified by him as having been approved by such convention; and

(*d*) the Governor-General has submitted such draft constitution for acceptance to a referendum of the electors of such area; and

(*e*) the Chief Electoral Officer of the Commonwealth has certified that such draft Constitution has been accepted by the electors of such area; and

(*f*) the Chief Justice of the High Court has certified that the proposed terms of separation of the proposed new State from the present State or States are just as regards present indebtedness.

124. The proposed areas referred to in sections 121, 122, 122A and 123 shall not in either case be less than 38,000 square miles, nor contain less than 75,000 inhabitants".

The following proposed alterations were submitted by Mr. V. C. Thompson (evidence, pp. 1135, 1136, 1137-1138):—

Proposals of the Riverina New States Movement, 1922.

"(1) That section 123 of the Commonwealth Constitution Act be amended to read as follows:—

That the Parliament of the Commonwealth may increase, diminish, or otherwise alter the limits of a State upon such terms and conditions as may be agreed upon and may make provision respecting the effect and operation of diminution or alteration in relation to any State with the consent of a three-fifths majority of the electors entitled to vote at a Commonwealth election in the area affected.

(2) That section 124 be amended to read as follows:—

"A new State may be formed by separation of territory from a State, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of a three-fifths majority of the electors entitled to vote at the Commonwealth elections in the area so affected".

(3) That a new section be added to Chapter VI. of the Commonwealth Constitution as follows:—

That the Commonwealth Parliament shall, on a petition being presented signed by 10,000 electors in an area containing not less than the equivalent in population of one Commonwealth electorate praying such a vote be taken in such area on a matter affecting such area, cause a vote to be taken without further delay.

(4) That a State should have the following powers:—

(*a*) direct taxation within its area in order to raise revenue for State purposes;

(*b*) the borrowing of money on the sole credit of the State for developmental purposes, provided that a referendum must be taken when a large sum, say, over £250,000, is required, sinking funds to be established in all cases for the redemption of loans;

(*c*) lands, irrigation, agriculture and forestry;

(*d*) education;

(*e*) hospitals and charitable institutions;

(*f*) municipal, shire, and local government generally;

(*g*) local works and undertakings within the State, excepting any work declared to be a national work;

(*h*) markets and pounds;

(*i*) fish and game preservation;

(*j*) enforcement of State laws;

(*k*) generally all matters of a local nature, and all other subjects which may be delegated to the State Parliaments by the Commonwealth Government;

(*l*) adult suffrage for the Commonwealth and States.

Additional resolutions carried were—

(1) that the initiative and referendum be incorporated in Federal and State Constitutions;

(2) that in dividing Australia into small States the chief objective should be economy of government with one House;

(3) that the States be equally represented in the Senate, and senators be elected on the proportional representation system".

Proposals of the Northern New States Movement.

"1. The Parliament of the Commonwealth shall have power to establish new States upon receipt of a petition which shall be signed by a number of Commonwealth electors as shall be from time to time determined by Act of Parliament, and such petition shall at once be inquired into to determine its *bona fides* by a royal commission to be appointed by the Federal Parliament, and upon which the Federal Parliament, the State Parliament, and the petitioners concerned shall have representation.

2. If the Federal Parliament shall decide to act upon the petition, a referendum of the whole of the electors in the area covered by the petition shall be taken within twelve months from the date of receipt of the petition by Parliament, a bare majority of electors voting to determine the question.

3. Upon acceptance by the Commonwealth Parliament of authority to establish a new State, a tribunal, which shall have due representation of the Commonwealth the existing State and the proposed new State, shall examine the terms and conditions, and recommend the constitution upon which the new State shall be established, and furnish a report to Parliament, which shall forthwith proceed to establish the new State by formulating a constitution, which shall be submitted to a referendum of the Commonwealth electors enrolled within the boundaries of the proposed subdivision.

4. In the event of the rejection of this constitution by a majority of the electors voting, the Commonwealth Parliament shall consider any proposals which are unacceptable to the people within the separating area, and having come to a final determination shall submit the revised constitution which, if approved by the people concerned, shall become operative forthwith.

5. If such revised constitution is rejected by a majority of the electors voting, the Commonwealth Parliament shall take no further steps to establish a new State in that particular area unless, in the event of a fresh referendum in the area covered by the petition, the question is again referred to Parliament for further determination. If there is still no agreement by the Commonwealth and the people of the separating area concerned, no further referendum of the area covered by the petition shall be taken for a period of at least six years".

Proposals drafted by Mr. Latham.

Under the proposed alterations drafted by Mr. J. G. Latham, K.C., now the Attorney-General for the Commonwealth, and placed before the Prime Minister by a deputation in July, 1923, as tentative suggestions for giving effect to the views of the Northern New States Movement, section 122 would remain unchanged, and the following sections would be substituted for sections 121, 123 and 124:—

"*Section* 121.—The Parliament may admit to the Commonwealth or establish new States and may upon such admission or establishment make or impose such terms and conditions as it thinks fit.

The terms and conditions shall be expressed in an Act of the Commonwealth Parliament and shall be alterable only as provided in such Act, provided that the extent of representation of a new State in the Senate shall be equal to that of the original States.

Section 123.—With respect to the establishment as a new State of an area part of an existing State, the following procedure may be adopted:—

(*a*) Twenty per cent. of the electors upon the Commonwealth electoral roll in any area not less in extent than the smallest existing State may petition the Parliament for the admission of such area to the Commonwealth as a new State.

(*b*) Upon receipt of such petition the Parliament shall appoint a commission of not less than three persons to determine precisely the boundaries of a referendum area which in the opinion of the commission, regard being had to community of interest and geographical position and to such other matters as the commission may deem relevant and to the desires of the petitioners, is most suited to institute a new State in or about the area mentioned in the said petition.

(*c*) Upon receipt of the report of the commission the Parliament may determine the terms and conditions upon which the Government is prepared to establish the referendum area as a new State.

(*d*) The Parliament may submit to the electors qualified to vote for the election of members of the House of Representatives either—

(i) in the referendum area, or

(ii) in the State containing the referendum area,

the question whether the Parliament should on a specified date establish the referendum area as a new State upon the terms and conditions determined as aforesaid, and with the constitution recommended by the convention hereinafter mentioned. The vote of the electors shall be taken in such manner as the Parliament prescribes.

(*e*) Before the said question is submitted to electors as aforesaid, a convention shall be elected by the electors in the referendum area qualified as aforesaid. The Parliament shall determine the number of members and method of election of the said convention, and so far as it thinks fit the rules of procedure for the said convention, and all matters incidental to the qualifications and rights and privileges of members of the convention. The convention shall recommend to the Parliament a constitution for the referendum area to become operative if and when the referendum area becomes a State.

The constitution shall contain a distinct part consisting of provisions adjusting or for the adjustment of questions arising out of the severance of the referendum area from the State of which it forms part.

(*f*) If in the referendum area or in the State containing the referendum area, as the case may be, a majority of the electors voting answer the said question in the affirmative, the referendum area shall on the specified date become and be established as a State of the Commonwealth upon the said terms and conditions and with the said constitution. The said terms and conditions shall be alterable only in the manner provided by this Constitution for altering the provisions of this Constitution. The said constitution as recommended as aforesaid shall as from the specified date be the constitution of the new State.

(*g*) The new State and the State which contained the referendum area shall as from the specified date be bound by the distinct part of the constitution of the new State hereinbefore mentioned.

The High Court shall have jurisdiction to determine any disputes or differences arising between the new State and the said State in relation to the said part of the said constitution of the new State, and the decision of the High Court thereon shall be final and conclusive, unless the King may be pleased by virtue of His Royal Prerogative to grant special leave to appeal from the High Court to His Majesty in Council.

Section 124.—Notwithstanding anything contained in this Constitution, a new State may be formed by separation of territory from a State with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States with the consent of the Parliament of the State affected."

The New States Royal Commission in New South Wales.

No attempt has been made to make use of the existing provisions relating to new States, but in 1922, after the passing of a resolution in favour of the creation of a new State in New South Wales, application was made to the Prime Minister of the Commonwealth for his assistance. The resolution and an extract from the correspondence are here set out (*cf.* Exhibit No. 1 tendered to the New States Royal Commission in New South Wales) :—

In September, 1922, the following resolution was carried by the Parliament of New South Wales:—

That the large area of the State of New South Wales makes it desirable that the creation of a separate State in Northern New South Wales should be taken into early consideration by a Federal Convention summoned for the purpose, and to consider the boundaries of the States and distribution of legislative powers between the States and the Commonwealth.

That this resolution be conveyed to the Federal Government and Government of the States with a view to securing their concurrence.

In answer to the letter which was transmitted to the Federal Government, the present Prime Minister sent the following letter:—

Melbourne, 12th June, 1923.

Dear Sir,

Your letter of 28th September, 1922, conveying the texts of resolutions passed by the Legislative Assembly of New South Wales, to the effect that it is desirable that the creation of a separate State in New South Wales should be taken into early consideration by a Federal Convention, has been considered by my Government.

As, however, the Constitution already provides that a new State may be formed by diminishing or otherwise altering the limits of an existing State subject to the consent of the Parliament of that State, and further empowers the Commonwealth Parliament to admit new States so formed, there does not, in the opinion of my Government, appear to be any necessity at this stage for submitting the matter to a Federal Convention.

The first step which would appear to be necessary is that the Parliament of your State should affirm not only the principle that a partition of the State is desirable, but the terms thereof, such as the boundaries of the new State, and the allocation between the parent State and the new State of public debts and public assets, such as railways and rolling stock.

When such a proposal has been formulated, the Commonwealth Government, subject to the concurrence of the Commonwealth Parliament, as provided in the Constitution, will be prepared to take whatever steps are necessary to give effect to the wishes of the Parliament and people of New South Wales.

Yours faithfully,
(Sgd.) S. M. BRUCE,
Prime Minister.

The Government of New South Wales appointed a Royal Commission to inquire into proposals then formulated, and the Commission after inquiry found that it was neither practicable nor desirable that these proposals should be carried into effect. This decision was based very largely on evidence to the effect that the creation of new States as proposed would increase the cost of government and the taxation to be paid by residents in the proposed areas, and also on the finding that many of the benefits claimed by the advocates of new States could be obtained by an extension of local government and by further decentralization in administration.

Aborigines.

The Commonwealth Parliament has no power to make laws with respect to the aboriginal inhabitants of Australia, " the aboriginal race in any State " being specially excluded from the words of section 51 (xxvi), by which power is conferred to make laws with respect to the people of any race for whom it is deemed necessary to make special laws.

A great number of witnesses before this Commission urged the need of giving increased attention to aborigines. Some of the witnesses took the view that complete control should be handed over to the Commonwealth, and others urged that the control could be more satisfactorily carried out by the States. The Commonwealth at present exercises control over aborigines of the Northern Territory, of whom there are 20,000 full bloods and 782 half castes. It was suggested that a portion of the Northern Territory, in Arnheimland, should be set aside for aborigines as a native State or native settlement, or as a reserve or territory from which white settlers were excluded. It was also suggested that if the control of aborigines were to remain with the States, there should still be a Commonwealth advisory council, which would keep in touch with the proper authorities and with citizens and employers. One of the main reasons advanced for transferring the control of aborigines to the Commonwealth was the existence of a great diversity in the methods of employment in the several States and the rules relating to payment of wages. It was claimed that as an aboriginal knew nothing of political boundaries, the laws by which he is governed should be uniform and imposed by one authority only. It was urged that as the reputation of Australia may be greatly affected by the treatment

of aborigines, the responsibility should rest with the national government. It was also urged that, if the care of the aborigines were entrusted to the Commonwealth, which already has the guardianship of natives in Papua and the Mandated Territory, a Commonwealth public service which was responsible for the welfare of native races both in Australia and in Territories outside Australia, and which provided a career for a specially trained staff, would be in a better position than the public service of a State to attract and train suitable officers for dealing with problems affecting the aborigines.

On the other hand attention was drawn to the fact that, in order to make proper provision for the treatment of aborigines in several States—Queensland, South Australia and Western Australia—it was necessary to set aside reserves, and that it was desirable that the treatment of aborigines should be in the hands of the governments which have control of lands. It was also urged that the State authorities and the State police were better qualified to control aborigines than those of the Commonwealth, and that it would be inconvenient to appoint Commonwealth officials to act within the areas of the several States, though some witnesses expressed the view that in any case the care and management of the aborigines should not be in the hands of police. Further, it was urged that in the past the treatment of aborigines had been more satisfactory in the State of Queensland than in the Northern Territory. An account of the system of protection in force in Queensland, which is said to be the most satisfactory in the Commonwealth, will be found in the evidence of Mr. J. W. Bleakley, Chief Protector of Aboriginals in that State (p. 1475). In Western Australia one of the ways in which provision is made for aborigines is through Government cattle stations. An account of the methods adopted in connexion with these stations is given in the evidence of Mr. A. O. Neville, Chief Protector of Aborigines in Western Australia, who describes more particularly Moola Bulla Station in the East Kimberleys, where there is an area of about 1,250,000 acres, and a system is adopted under which cattle are killed daily to feed visiting aborigines. Station-holders within a radius of 150 miles of Moola Bulla have informed Mr. Neville that the aborigines are leaving cattle alone as the result of the establishment of this Government station (evidence, pp. 487, 490-491).

Examples of the divergencies in the laws of the States of Western Australia, South Australia, and Queensland, and of the Northern Territory relating to aborigines, are set out in the evidence of the Rev. William Morley, Honorary Secretary, Association for the Protection of the Native Races of Australasia and Polynesia, at page 1600.

During the sittings of this Commission, an inquiry on the subject of the aboriginals and half castes of Central Australia and North Australia was conducted by Mr. J. W. Bleakley, and his report to the Prime Minister was made on the 16th January, 1929 (*Parliamentary Papers*, No. 21, 1929).

Fauna and Flora.

The Commonwealth Parliament has no express power to make laws with respect to fauna and flora. It has power to make laws respecting the export of fauna or flora, and it has exercised this power under the

Customs Act 1901-1925. Under section 112 of that Act the Governor-General may by proclamation prohibit the exportation of any goods the prohibition of the exportation of which is in his opinion necessary for the preservation of the flora or fauna of Australia. This power has been exercised from time to time, the Customs authorities usually acting after consultation with a committee of citizens appointed in each State, or through the Chief Secretary's Department of the State. The manner in which this control has been exercised is referred to in section xiv of this report under the heading "Export of birds and animals, and the skins of birds and animals".

A number of witnesses before the Commission claimed that the efforts of the States to safeguard their fauna were hindered by the operation of section 92, and that a prosecution initiated by a State for the purpose of enforcing the enactments protecting birds or animals might be defeated owing to the absence of the same protection in an adjacent State. This question is referred to in section xiv of this report under the heading "Agents and dealers". Some witnesses urged that the Commonwealth should have power to make laws with respect to fauna; others suggested that legislation might be passed on the model of the Lacey Act in force in the United States, by which Congress has attempted to safeguard bird life. Other witnesses urged that the power to legislate with respect to fauna should remain with the States, but that there should be closer co-operation between the authorities of the different States, and that there should be periodical consultations for the purpose of advising the committees already referred to. It was said that close local knowledge is required in order to fix the proper periods of protection, that conditions vary greatly not only between States but also within the States themselves, and that the State authorities have an advantage in securing information through their control of the police (evidence of Mr. E. Ashby, p. 1099).

The evidence showed that efforts were made to protect bird and animal life by the State authorities through the schools and by means of reservations in connexion with public parks and elsewhere, and a resolution was quoted, passed by the Royal Australasian Ornithologists Union in 1922, asking that the Government of each of the States would see that in connexion with the surveying of new townships suitable reserves should be set apart for fauna and flora.

It was suggested by Dr. Brooke Nicholls that the Commonwealth should immediately undertake, by a biological survey, the study from an economical and a scientific stand-point of the native game resources of the mammals, birds and fishes of Australia. Samples of biological survey maps prepared by the department at Washington, showing the distribution and origin of the various mammals in the United States, were shown to the Commission.

It was urged by some witnesses before the Commission that unless a closer check over the export of birds and animals, and the skins of birds and animals, from Australia were kept by the Commonwealth, certain valuable species would be in danger of extinction. Reference was made in particular to the export of skins of the koala or native bear and of the opossum, and to the export of finches captured in the north of Australia.

Forestry.

The Commonwealth.

The Commonwealth Parliament has no power to make laws with respect to forestry for the whole of the Commonwealth, but it has power to make laws for forestry within any of the Territories, and it can influence the forestry policy of any of the States by making loans for forestry purposes subject to conditions, by providing assistance and advice to the States, and by establishing a school of forestry which students from the States may attend. The Commonwealth has provided a loan for forestry purposes, subject to conditions, to the State of South Australia, and has supplied assistance and advice to the State of Tasmania. The Commonwealth has also established a School of Forestry. This School was opened with eighteen students in March, 1926, and was housed for the first year at Adelaide University, but was transferred to Canberra early in 1927. Applicants for entrance must be graduates of an Australian University or matriculated students who have completed a minimum University course of two years in science. Prior to the establishment of the School, certain of the States had decided to establish a forestry school at Laurel Hill in the Cootamundra district of New South Wales, but they have not proceeded with the proposal. A programme of afforestation has been laid down for the Federal Capital Territory, and a nursery has been established.

Interstate and other conferences.

Since 1911 interstate conferences have been held from time to time in the State capitals, including conferences at Adelaide in 1916, at Perth in 1917, at Hobart in 1920, at Brisbane in 1922, and at Sydney in 1924. Australia was represented at a World's Forestry Congress held in Rome in 1926. In 1928 an Empire Forestry Conference was held in Australia, which met in Canberra and in every State of the Commonwealth as well as in New Zealand, and which re-affirmed the resolution of an Imperial Forestry Conference held in London in 1920, urging all governments of the Empire to lay down a definite forestry policy.

At the Forestry Conference held in Hobart in 1920 it was recommended that each State should reserve a specified area, so that the total reservation should be an area of 24,500,000 acres of indigenous forest lands to meet the future requirements of Australia. This area was adopted by the Premiers' Conference held later in the same year as the area at which the authorities should aim for permanent reservation. At present the reservations made by the States are considerably less than this total, and no State has so far reserved its specified area, but it appeared to the Commission that the total and specified areas may have been based to some extent on mistaken estimates.

The States.

Each of the States has a forestry system under the control of a Department or Commission, and in each State legislation has been or is about to be passed, providing for the manner in which lands may be dedicated to forestry purposes, for the control of forests, and for the manner in which lands may be thrown open to settlement after having been under the control of the Forestry Commission or Department. Evidence was given in all the States as to the manner in which

the forests were controlled, though in Victoria no official evidence was given. It appeared to the Commission that although forestry had been neglected in certain of the States for a time, great progress had been made in almost all the States in recent years.

Control of Forestry.

It was said during this inquiry that if a Council to control forestry in the Commonwealth were appointed on which the Commonwealth Government was represented, it would be likely that the States in framing their forestry schemes would give greater attention to the needs of Australia as a whole than they do at present, and that there would be less danger of forest lands being sacrificed to the demand for settlement.

Evidence in favour of a greater, or an exclusive, control of forests being transferred to the Commonwealth, was given by Mr. Lane-Poole, Commonwealth Inspector-General of Forests, by Mr. Dalrymple Hay, formerly Commissioner for Forests of New South Wales, and by Mr. McKay, formerly Conservator and Commissioner of Forests in Victoria. Evidence to the contrary was given by Mr. S. L. Kessell, Conservator of Forests of Western Australia, by Mr. E. H. F. Swain, Chairman of the Provisional Forestry Board of Queensland, and by other witnesses in Western Australia and Queensland.

Railways.

The Commonwealth.

The powers of the Commonwealth Parliament with respect to State railways are to be found in section 51 (i) as extended by section 98, section 51 (xxxii-xxxiv), and sections 102 and 104 of the Constitution. The operation of these provisions has been discussed in other sections of this report, particularly in the sections relating to trade and commerce, defence, industrial powers, and the Inter-State Commission. Reference has also been made to railways owned or controlled by the Commonwealth in the section relating to Territories. The principal railways owned and controlled by the Commonwealth are the Trans-Australian Railway from Port Augusta to Kalgoorlie, the first through train on which left Port Augusta on the 22nd October, 1917, the Port Augusta to Stuart Railway, control of which was assumed by the Commonwealth on the 1st January, 1926, and the Darwin to Birdum Railway. A number of other lines have been or are being surveyed by the Commonwealth.

Classification of freights, and tapering or developmental rates, on State railways.

Evidence was given before the Commission by Railway Commissioners or their representatives in all the States with the exception of New South Wales, and by the Commonwealth Railway Commissioner, in relation to the manner in which freights are classified and adjusted with the object of promoting land settlement and of rendering assistance to settlers. In particular, reference was made to the building of lines preceding settlement for purposes of development, to the assistance given out of general revenue in certain States for the purpose of making up losses on non-paying lines, and to the manner in which

rates are adjusted for the purpose of furthering "the development of the territory of a State" by reducing the freight per ton mile in accordance with the distance travelled, this being the rate referred to in section 104 of the Constitution. The Commission was informed by some witnesses that the discriminatory freights referred to in section 102 of the Constitution had been for the most part abolished by agreement among the Railway Commissioners, but it was said that some attempt is still made by classification of freights and otherwise to attract trade away from its natural economic or geographical outlet.

Many of the grievances arising from this form of competition which were discussed at the Federal Conventions have been removed by the agreement already mentioned and by the agreement between the States of Victoria and New South Wales under which the State of Victoria has built lines into the South Western Riverina and now operates them as part of the Victorian system, but it appears that there are still instances of the refusal or contemplated refusal by a State to allow its railway system to be connected with the railway system of another State lest the trade of its border districts be lost to its capital city.

On this matter reference may be made to the evidence of Mr. Clapp, Chairman of the Victorian Railway Commissioners (p. 749):—

> "Prior to 1905 the State Railways of Victoria, New South Wales, and South Australia, by means of special rates competed intensively with each other for traffic to and from districts adjacent to their borders. In 1905 an agreement was reached between the States to practically eliminate this competition by reducing the existing special rates to a comparatively few items and to prevent their extension. Provision was also made that alterations to classification of goods should not be confined to the competitive areas but should apply generally throughout the State concerned. Since that date no effort has been made by any of the States concerned to divert traffic from its natural outlet by classification or otherwise. Each State, however, frames its own classification of goods, which specifies the particular rate at which each description of traffic shall be charged. The many differences in the respective classifications have an effect in the routing of traffic to the capital cities in neighbouring States. From time to time, however, reductions have been made in classification in one State below that provided in other States, and although these reductions in classification were made applicable generally throughout the State concerned, they have the effect of making the rates for similar traffic lower than in neighbouring States and so enable goods to be carried for much longer distances in the State where the variation is made than in adjacent States. In addition to differences in classifications which have the effect of the same goods being charged at different class rates in the various States, considerable variations occur in the application of the tapering principle."

Mr. Bell, Commonwealth Railways Commissioner, expressed the opinion that the tapering or developmental rate above referred to was necessary in the interests of settlement and as a part of railway policy, but stated that he would prefer to see a rate which would be applied

independently of State boundaries so that a consignor at a distance from the destination of his goods would have the benefit of the same concessions, whether the journey traversed was wholly in one State or not (evidence, p. 345).

At the instance of Mr. Bell a conference was held in order to ascertain the cost to the States of applying uniform freights and fares throughout the Commonwealth. It was found after investigation that the gross railway revenue of New South Wales would be considerably reduced by the change, and that Victoria and Queensland would benefit.

Uniform gauge.

Evidence was given before the Commission of the benefits that would accrue by the introduction of a uniform gauge (*see* evidence, particularly p. 347), but the opinion was expressed by Mr. Webb, Railway Commissioner of South Australia, that the economies effected would not compensate for the cost of the necessary works. At present by agreement between the Commonwealth and the States of New South Wales and Queensland the uniform gauge work now being carried out (the Sydney-Grafton Kyogle-South Brisbane connexion) is controlled by the Railway Council consisting of the Commonwealth Railways Commissioner, the Chief Commissioner of Railways of New South Wales, and the Commissioner for Railways of Queensland. The agreement provides that the Council shall among other things have entire control of all the works contemplated by the agreement and take all necessary steps to secure standardized methods and types of construction. In respect of the main conversion works, if undertaken, it was recommended by the Royal Commission on Uniform Gauge in 1921 that a Director should be appointed who would have power and responsibilities similar to those now vested in the Railway Council, and in addition it was recommended that each of the various Railways Commissioners should act as agent for the Director to carry out the works required in the terms and conditions specified by the Director and give all necessary consents and do all things within its powers, acquiring lands, &c., as may be required by the Director. In 1925 an agreement was entered into between the Commonwealth and the State of South Australia which provides for a standard gauge railway from Port Augusta to Red Hill, and for a third rail on the railway between Red Hill and Adelaide, so that the Trans-Australian trains may run into Adelaide (evidence, p. 346).

Commonwealth control.

The opinion was expressed before the Commission that both economy and efficiency would be promoted if the whole of the railway systems of the Commonwealth were placed under central control. The example of South Africa was quoted as a proof of the value of a centralized system with decentralized administration, particularly in the use of rolling stock and of other material, and the examples of South Australia and New South Wales were quoted to show the increased cost of isolated systems. Other witnesses claimed that the control of railways is so closely connected with land settlement and development that it could not conveniently be exercised by the Commonwealth so long as these

functions continue to be discharged by the States. It was also suggested that the Commonwealth should take over the direction of all communications as a means of relieving the States of some portion of their liabilities and expenditure (*see* evidence of Professor Mills, p. 1160).

The Commission was informed that conferences were held from time to time between the Commissioners of the different States, or between railway officials, and that considerable benefit had been derived from these conferences. On this point, however, Mr. Clapp said (evidence, p. 744) :—

> "Endeavours have also been made by a series of annual conferences of officials of the various railway systems to achieve uniformity of practice and policy in a multitude of matters of varying importance. In some respects standardization has been achieved, but in many of the most important matters of administration this is not so, nor does success in this respect appear to be likely under present conditions. This is due to the divergent views of the various administrations on many matters of broad policy and of railway practice. I do not claim that Victoria is any less to blame than the other States. The plain fact is that wide and honest differences of opinion are only natural under existing conditions, they would be reconciled or determined under a system of central control ".

Mr. Bell, Commonwealth Railways Commissioner, said (evidence, p. 347) :—

> "With regard to any constitutional changes considered desirable, I would point out the financial position of the Australian railways for a number of years has been very unsatisfactory. Their capital cost as at June, 1926, was £288,392,000, and for a considerable period they have failed to meet the whole of the interest on capital invested. The latest returns available, *viz.*, for the year ended 30th June, 1926, show only 2.23 per cent. was earned.
>
> It would appear that their only salvation would be control by one central body. This would immediately solve the difficulties referred to in the foregoing as regards uniform freights and fares, standard structure gauge, control in time of war, uniform gauge, and construction of new railways without the consent of the State. It would enable large economies to be effected in a number of directions and would be following the practice in other parts of the world not only with regard to railways but also with regard to other large business undertakings. It would in my opinion be advisable for the Constitution to be amended so as the Commonwealth could assume control of the various railway systems of the States."

The opinions expressed by Mr. Bell and Mr. Clapp on the subject of central control were supported by Mr. St. Hill, Commissioner of the Tasmanian Government Railways. Mr. Fraser, Chief Commissioner of Railways in New South Wales, did not give evidence before this Commission, but in giving evidence before the Royal Commission on New States in New South Wales in the year 1925 he expressed an opinion that economy in railway administration and organization is promoted by central control with decentralized administration.

On the other hand Mr. Webb, Commissioner of Railways in South Australia, expressed himself on this subject as follows (evidence, p. 989) :—

> "Certainly the creation of any Federal control would simply super-impose an additional overhead charge, because I do not believe you could dispense with any of the local organizations. Some of the arguments presented have been that such control would bring about economies in organization, in standardization of equipment, and further the project of unification of gauges. I have had some experience of such a 'scrambling' of railways in United States during the War period when the government attempted to take over the operations of all the railways in the States, and we saw the evil effect of the attempt to standardize along those lines. Standardization of locomotives and cars invariably means stopping the hands of progress, and that is exactly what took place there. . . . The interests of the States are so diverse and the mileage of the railways is getting so large that I think any central organization of that kind would be unworkable and really stop instead of advance the progress of the Commonwealth."

Opposition to Commonwealth control was also expressed by Mr. Evans, who was then Deputy Commissioner and is now Commissioner of Railways in Western Australia, and with some reservation by Mr. Davidson, Commissioner of Railways in Queensland. The opinion was expressed by a number of witnesses that railway policy and the control of railways could not be dissociated from the control and management of the lands of the State and of trade and commerce generally, and Mr. Holman, K.C., expressed his opinion that railway development was a function which could not be efficiently discharged by a central government.

XXI.—THE ALTERATION OF THE CONSTITUTION.

Section 128 of the Constitution.

It has already been mentioned that the provisions of the Constitution, though not "covering clauses" 1-8 of the Act by which the British Parliament gave legal effect to the Constitution, may be altered by the method prescribed in section 128. Under this section a proposed law to alter the Constitution may be initiated in either House of the Commonwealth Parliament. Before it is submitted to the electors, it has, normally, to be passed by an absolute majority of each House. If it is so passed, it must be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives, and within the time fixed by the section, that is to say, not less than two nor more than six months after its passage through both Houses. The vote is to be taken in such manner as the Parliament prescribes. If the proposed law is approved in a majority of the States by a majority of the electors voting, and is also approved by a majority of all the electors voting, it is to be presented to the Governor-General for the royal assent.

The section provides an alternative procedure under which the proposed law may be submitted to the electors after being passed by one House, though this procedure will not necessarily ensure its submission. Either House may pass the proposed law by an absolute majority, and if the other House does not concur, whether by rejecting or failing to pass it or passing it with an unacceptable amendment, the House in which the proposed law was initiated may, after an interval of three months, in the same or next session, again pass it, with or without any amendment which has been agreed to by the other House. If the other House again does not concur, the Governor-General may submit the proposed law to the electors, but will, it seems, be guided by the advice of his Ministers (*see* P. D. 1914, vol. lxxiv, p. 2420; and section v of this report). If he submits the proposed law, it is to be submitted in the form last proposed by the House in which it was initiated, and either with or without any amendments subsequently agreed to by both Houses.

Section 128 prohibits certain alterations of the Constitution unless, in addition to approval by the majorities required in other cases, they also receive approval in the State or States affected. The prohibition is set out in the last paragraph of the section and is as follows:—"No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law".

The powers of altering the Constitution extend to section 128 itself as well as to the other sections of the Constitution. Both the method of alteration and the restrictions against alteration may be changed under those powers. The only question is as to the approval required. Except as to the concluding paragraph, it is clear that any provision of section 128 may be altered with the approval of a majority in four of the States and of a majority in the Commonwealth. It is also clear

that the paragraph itself may be altered with the approval of a majority in each of the States. What does not seem to be clear is whether the paragraph may be altered without that approval, and on that point different opinions have been expressed. The view expressed by Sir Robert Garran was that the paragraph may be altered with the approval of a majority in four of the States and of a majority in the Commonwealth, so that in a subsequent referendum the alterations which are at present prohibited, except with the assent of a State, might be made without that assent. This view was not accepted by Sir Edward Mitchell, K.C., and it may be suggested that it scarcely appears to give sufficient weight to the final prohibition. After specifying three matters in which the Constitution is not to be altered except with the assent of a State—that is to say: (*a*) diminishing the proportionate representation of any State in either House, (*b*) diminishing the minimum number of representatives of a State in the House of Representatives, and (*c*) diminishing or otherwise altering the limits of the State—the Constitution prohibits any alteration "in any manner affecting the provisions of the Constitution in relation thereto". Those words are themselves a provision of the Constitution in relation at least to "increasing, diminishing or otherwise altering the limits" of a State, and seem, therefore, to afford a strong argument against a power to alter that part of the paragraph without the assent of the State. The question is of particular importance to the advocates of an alteration of those sections of the Constitution which relate to the creation of new States.

Methods of altering the Constitution.

Section 128 of the Constitution begins with the words "This Constitution shall not be altered except in the following manner". The Constitution may, however, be altered by an Act of the British Parliament, though it would not be in accordance with constitutional practice for the British Parliament to pass such an Act without the consent of the Commonwealth (*see* section viii. of this report). On one interpretation of section 51 (xxxvii) it may also be altered by a reference to the Commonwealth Parliament of some matter by all the States. This interpretation of section 51 (xxxvii) is, however, open to some doubt. It was suggested before this Commission that the States were not entitled to confer on the Commonwealth Parliament a new legislative power, but only to empower it to pass an Act on a specified subject in a specified form, and it was suggested that the power might be revoked after it had been conferred. The power of reference has never been acted upon by all the States simultaneously, and has never been acted upon by the Commonwealth Parliament.

It seems, too, that section 105A, which was inserted by *Constitution Alteration* (*State Debts*) 1928, has introduced what is in effect a new method of altering both the Constitution of the Commonwealth and the Constitution of the States, so far as relates to the public debts of the States and the borrowing of money by the Commonwealth and the States, namely, by agreement between the Commonwealth and the States, which is to be binding on the parties notwithstanding anything contained in the Constitution of the Commonwealth or the Constitution of the several States (*see* section viii. of this report under the heading "Financial Agreements between the Commonwealth and the States").

The description of the Commonwealth as a Federal Commonwealth.

Quite apart from any significance that may be attributed to the preamble of the Commonwealth of Australia Constitution Act, which recites the agreement to unite in a Federal Commonwealth under the Constitution, the covering clauses, and especially the description, in covering clause 3, of the Commonwealth as a Federal Commonwealth, raise a question whether the powers of alteration contained in section 128 may be used to substitute a frame of government which is not federal. On this point conflicting views, including those of Sir Robert Garran and Sir Edward Mitchell, were expressed before the Commission (*see* evidence, pp. 101, 754, 763, 764-765). An opinion given by Mr. Owen Dixon, now Mr. Justice Dixon, is set out in Appendix F (*see* evidence, pp. 794-795, 1112-1113).

Various definitions of a federal system have been given from time to time, and the term Federal has been applied to a number of constitutions widely differing in the relations of the States and the central government, and in the manner in which the constitution may be altered or interpreted. The definitions of a Federal system include the following:—

> "A form of government in which sovereignty or political power is divided between the central and the local governments, so that each of them within its own sphere is independent of the other. The distribution of powers between the local and central governments may vary to any extent; but the fundamental idea is always that of the two-fold sovereignty and the independence of each government within its own sphere" (Sir Robert Garran—*see* the report of the royal commission on the finances of Western Australia).

> "A 'federal government' exists where, in a political community, the powers of government are distributed between two classes of organization—a central government affecting the whole territory and population of the sovereignty, and a number of local governments affecting particular areas and the persons or things therein —which are so far independent of each other that the one cannot destroy the other, or encroach upon the sphere of the other as determined by the Sovereign in the Constitution. Both are completely subject to the State. Either may be changed or abolished at will by the State. It appears to involve also the existence of some authority recognized by the central and local parts as competent to determine the conflicts which arise as to their respective powers" (Sir William Harrison Moore, *Constitution of the Commonwealth of Australia*, 2nd edn., p. 68).

> "In a loose sense the word 'federal' may be used . . . to describe any arrangement under which self-contained States agree to delegate their powers to a common government with a view to entirely new constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original constitutions" (*see* the judgment of the Privy Council delivered by Viscount Haldane, *L.C.*, in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.*, 17 C.L.R. at pp. 651-652).

Its [the American Federal Republic's] central or national government is not a mere league, for it does not wholly depend on the component communities which we call the States. It is itself a commonwealth as well as a union of commonwealths, because it claims directly the obedience of every citizen, and acts immediately upon him through its courts and executive officers. Still less are its minor communities, the States, mere subdivisions of the Union, mere creatures of the national government, like the counties of England or the departments of France. They have over their citizens an authority which is their own, and not delegated by the central government. They have not been called into being by that government. They—that is, the older ones among them—existed before it. They could exist without it" (Bryce, *American Commonwealth,* 1910, vol. 1, p. 16).

"The name of Federal government may be applied to any union of component members, where the degree of union between the members surpasses that of mere alliance, however intimate, and where the degree of independence possessed by each member surpasses anything which can fairly come under the head of merely municipal freedom" (Freeman, *History of Federal Government in Greece and Italy,* 2nd edn., p. 2).

"A Federal Commonwealth in its perfect form is one which forms a single State in its relations to other nations, but which consists of many States with regard to its internal government" (Freeman, *supra,* p. 9).

"A Federal State is one in which there is a central authority that represents the whole, and acts on behalf of the whole in external affairs and in such internal affairs as are held to be of common interest; and in which there are also provincial authorities with powers of legislation and administration within the sphere allotted to them by the Constitution" (Sir Herbert Samuel, *Nineteenth Century,* No. 428, p. 676).

"A society or league formed for joint action or mutual support: now chiefly, a body formed by a number of separate States, societies, &c., each retaining control of its own internal affairs" (*Oxford English Dictionary*).

It was suggested before the Commission that "Federal" in covering clause 3 has not an exact meaning to which recourse might be had by the Courts for the purpose of restricting alterations of the Constitutions. In any case, however, it seems clear that the existing distribution of powers between the Comonwealth and the States may be substantially changed without any infringement of the covering clauses, and that for most purposes at least any restrictions on change are to be found, not in covering clauses 1-8, but in the Constitution itself.

Referendums.

Proposed laws for the alteration of the Constitution have been submitted to the people under section 128 on seven occasions—in 1906, 1910, 1911, 1913, 1919, 1926 and 1928. Recourse was also had to the section in 1914 and 1915, but where the Senate, in 1914, initiated a proposed law and failed to obtain the approval of the House of Representatives, the question was not submitted to the people, and in 1915 the

referendums, by an arrangement with the State Premiers, were abandoned under the provisions of the *Referendum (Constitution Alteration) Act (No. 2)* 1915 before a vote was taken. Except on two occasions—in 1911 and 1926—the vote on a referendum has been taken on the day of a general election.

In 1906 it was proposed to alter the dates of the periodical Senate elections. No party question was involved, and the proposed law was carried by large majorities, the total votes being 774,011 in favour, and 162,470 against, with the six States voting for the proposal.

In 1910 there were two referendums, which have been discussed in section xix of this report. One related to section 105 of the Constitution, under which the Commonwealth Parliament could take over only those State debts which were in existence at the establishment of the Commonwealth. It was proposed to make the section apply to all State debts irrespective of the date on which they were contracted. This proposal was carried, the total votes being 715,053, in favour, and 586,271 against, with all the States except New South Wales voting in favour. The other proposal was (*a*) to allow the Commonwealth notwithstanding anything in the "Braddon Clause" (s. 87) to apply towards its expenditure for the service of the year beginning on the 1st July, 1909, a sum not exceeding £600,000 over and above one-fourth of the net revenue from duties of customs and of excise; (*b*) to terminate the "Braddon Clause" six months before the expiration of the ten years from the establishment of the Commonwealth; (*c*) to terminate section 93, which dealt with the payment of balances to the States in the initial stages of Federation; (*d*) to terminate section 94, which deals with the distribution of surplus revenue of the Commonwealth among the States; and (*e*) to insert a provision in the Constitution under which the Commonwealth should, as from the 1st July, 1910, make certain *per capita* payments to the States, together with a special grant to Western Australia. This proposal was rejected, the total votes being 645,514 in favour, and 670,838 against, with three States, Queensland, Western Australia and Tasmania voting for, and three States, New South Wales, Victoria and South Australia, voting against the proposal.

In 1911 there began a series of proposals to increase the powers of the Commonwealth. In that year there were two referendums, one dealing with certain legislative powers relating to commerce and industry, and the other dealing separately with monopolies. The former grouped four matters, the object of the proposed law being to give the Commonwealth Parliament power to deal with (*a*) trade and commerce generally, including the internal trade and commerce of the States; (*b*) the control and regulation of corporations of all kinds except those formed not for the acquisition of gain; (*c*) labour and employment, including wages and conditions of labour and employment in any trade industry or calling, and the prevention and settlement of industrial disputes in relation to employment on State railways; and (*d*) combinations and monopolies in relation to the production, manufacture or supply of goods or services. This proposal was rejected, the total votes being 483,356 in favour, and 742,704 against, with only one State, Western Australia, voting in favour. In regard to monopolies it was proposed to insert a new paragraph (xl) in section 51, under which, in any case where each House declared by resolution that the industry or business of producing, manufacturing or supplying goods,

or of supplying any specified services, was the subject of a monopoly, the Commonwealth Parliament should have power to make laws for carrying on the industry by or under the control of the Commonwealth, and acquiring for that purpose on just terms any property used in connexion with the industry or business. This proposal was rejected, the total votes being 488,668 in favour, and 736,392 against, with only one State, Western Australia, voting for the proposal.

In 1913 the alterations which had been submitted in 1911 in two proposed laws, four matters being grouped in one of them, were submitted in similar but not identical terms, together with a proposal in regard to employees on State railways, under which jurisdiction might be conferred on a Commonwealth tribunal. On this occasion the proposals were submitted as six separate proposals, the voters being at liberty to vote for or against any one or more of them. The proposals were rejected, the total votes being as follows:—

Trade and commerce, 958,419 in favour; 982,615 against.
Corporations, 960,711 in favour; 986,824 against.
Industrial matters, 961,601 in favour; 987,611 against.
Railway disputes, 956,358 in favour; 990,046 against.
Trusts, 967,331 in favour; 975,943 against.
Nationalization of monopolies, 917,165 in favour, and 941,947 against.

Three States, Queensland, South Australia and Western Australia, voted for, and three States, New South Wales, Victoria, and Tasmania, voted against each proposal.

In 1915 it was proposed to alter the Constitution in regard to the legislative powers of the Commonwealth Parliament somewhat differently from the proposals submitted in 1911, and 1913, but the writs issued for the submission of these modified proposals were, as explained above, revoked before any vote was taken.

In 1919 there were two alterations proposed, one to extend the legislative powers of the Commonwealth Parliament in regard to industrial disputes, and the other to confer power to deal with the nationalization of monopolies. Both proposals were rejected. The total votes in regard to the industrial powers were 911,357 in favour, and 924,160 against. The total votes in regard to the power to deal with nationalization of monopolies were 813,880 in favour, and 859,451 against. Three States, Victoria, Queensland and Western Australia, voted for, and three States, New South Wales, South Australia, and Tasmania, voted against each proposal.

In 1926 there were two alterations proposed, one relating to industry and commerce, and the other to essential services. The former grouped three matters. Paragraph (xx) of section 51 was to be omitted, and in its stead a new paragraph inserted to give the Commonwealth Parliament power to make laws with respect to corporations, including the creation regulation control and dissolution of corporations, the regulation control and dissolution of corporations formed under the law of a State, and the regulation and control of foreign corporations, but not including municipal or governmental corporations, or any corporation formed solely for religious, charitable, scientific or artistic purposes, or any corporation not formed for the acquisition of gain by the corporation or its members. From paragraph (xxxv) of section 51, which deals with conciliation and arbitration for the prevention and settlement of

industrial disputes, the words which restrict the powers of the Commonwealth Parliament to disputes "extending beyond the limits of any one State" were to be omitted. After paragraph (xxxix) of section 51 three new paragraphs were to be inserted to give the Commonwealth Parliament power to make laws with respect to:—

(xl) establishing authorities with such powers as the Parliament confers on them with respect to the regulation and determination of terms and conditions of industrial employment and of rights and duties of employers and employees with respect to industrial matters and things;

(xli) investing State authorities with any powers which the Parliament, by virtue of paragraph (xxxv) or paragraph (xl) of this section, has vested or has power to vest in any authority established by the Commonwealth;

(xlii) trusts and combinations (whether composed of individuals or corporations or both) in restraint of trade, trade unions, and associations of employers and employees for industrial purposes, including the formation, regulation, control and dissolution thereof.

This proposal was rejected, the total votes being 1,247,088 in favour, and 1,619,655 against, with two States, New South Wales and Queensland, voting for, and four States, Victoria, South Australia, Western Australia and Tasmania, voting against the proposal.

In regard to essential services, it was proposed to insert a new paragraph (va) to give the Commonwealth Parliament power to make laws with respect to "protecting the interests of the public in the case of actual or probable interruption of any essential service". This proposal was rejected, the total votes being 1,195,502 in favour, and 1,597,793 against, with two States, New South Wales and Queensland, voting for, and four States, Victoria, South Australia, Western Australia, and Tasmania, voting against the proposal.

In 1928, after an agreement had been made between the Commonwealth and the States with respect to State debts and the borrowing of money by the Commonwealth and the States, which provided among other things that the Commonwealth would take the necessary action to submit proposals for the alteration of the Constitution in a form which was set out in the agreement, the proposals were carried, the total votes being 2,237,391 in favour, and 773,852 against, with the six States voting in favour of the proposals.

It will be seen that with the exception of the proposals to make section 105 of the Constitution apply to all State debts, whenever contracted, and to enable the Commonwealth to make binding agreements of a permanent character with the States in regard to State debts and borrowing by the Commonwealth and the States, each proposal to confer new legislative powers on the Commonwealth Parliament has been rejected, though in some instances by narrow majorities.

Suggested alterations of Section 128.

Suggestions for an alteration of section 128 in order to give greater flexibility to the Constitution will be found in the evidence of Mr. J. J. Kenneally, Federal President of the Australian Labour Party (p. 1101), Mr. E. S. Pratt (p. 1197), Mr. A. C. V. Melbourne (p. 1537), and the Hon. F. W. Eggleston (p. 727).

Mr. Kenneally, giving evidence on behalf of the Australian Labour Party, submitted proposals which were intended to give the Commonwealth Parliament "complete legislative powers, subject to such limitations only as will ensure the control of Parliament by the people". The following extract is from pp. 1106-1107 of his evidence:—

"We are of opinion that this can be done by granting to the Commonwealth Parliament power to alter the Commonwealth Constitution when and how desired by an absolute majority of the Commonwealth Parliament, in order to give effect to the will of the people declared at a general election.

The power of Parliament to alter the Constitution should not include power to extend the life of Parliament or to defeat the operation of the initiative and referendum and recall, nor to interfere with the adult franchise. These powers being fundamental should be embodied in the Constitution, and be alterable only by a vote of the people by referendum.

In a different category, but also fundamental to popular liberty and security, is the principle that the power of Parliament to alter the Constitution should not include power to impose conscription for military or naval service.

To give effect to these views we suggest that section 128 of the Commonwealth Constitution should be amended to read—128. The Constitution may be altered in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

No alteration of the Constitution extending the life of Parliament shall become law unless a majority of the electors of the Commonwealth voting by referendum approve the proposed law.

No alteration of section 8 or section 30 of the Constitution shall become law unless a majority of the electors in the Commonwealth voting by referendum approve of the proposed law.

Section 8 to be amended to read as follows:—

The qualification of an elector of members of the House of Representatives shall be that he is a natural-born or naturalized subject of the King of the age of 21 years and upwards, and that he is an inhabitant of Australia and has lived therein for at least six months.

Section 30 to be amended to read as follows:—

The qualification of an elector of members of the Senate shall be that he is a natural-born or naturalized subject of the King of the age of 21 years and upwards, and that he is an inhabitant of Australia and has lived therein for at least six months.

F.1251.—16.

New clause. No person shall be conscripted in Australia or in any territory under the control of Australia nor in any ship under the control of Australia for military or naval service.

Notwithstanding anything hereinbefore contained, sections (as proposed above, also sections 80 and 116) of this Constitution shall not be altered, except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes.

If a majority of all the electors voting approve the proposed law, it shall be presented to the Governor-General for the King's assent."

A statement prepared by Mr. Pratt as a member of the study group of the Constitutional Association of New South Wales (evidence, pp. 1197-1198) set out proposals for a method of altering the Constitution which would not involve a direct appeal to the electors, at least in the first instance, but would, it was thought, furnish the necessary safeguards against hasty and ill-considered changes. These proposals included two sets of provisions, one of which was to replace the normal procedure under section 128 in cases in which both Houses of the Commonwealth Parliament approve a proposed alteration, and the other was to replace the alternative procedure under that section in cases in which one House is unwilling to concur in a proposal made by the other House to alter the Constitution. The Constitution, it was suggested, might be altered by a bill passed by a two-thirds majority of the total number of members in each House on two occasions, after an interval of at least three months, in the life of the same Parliament, subject to the right of one half of the State legislatures to veto the bill, in which event the proposal would fail unless after a dissolution of the House of Representatives and a general election the bill were again passed by a two-thirds majority in each House. In cases in which one House on two occasions, with an interval of at least three months, failed to concur in a proposal made by the other House, the question might be determined by a two-thirds majority at a joint sitting of the two Houses, subject to the right of one half of the State legislatures to veto the bill.

Mr. Melbourne submitted proposals in which initiation and ratification of proposed alterations were separately considered in relation to a suggested Council of the States and to the Senate as at present constituted. The following extract is from p. 1542 of his evidence:—

> "*Initiation.*—(1) If it should be decided to create a Council of the States similar to that which has been indicated, the problem of initiation is not difficult. . . . It should be within the power of either the House of Representatives or the Council of the States to initiate proposals to amend the Constitution.
>
> (2) If no alteration is to be made in the composition of the Senate . . . authority should be given to the governments of the States to initiate proposals to amend the Constitution.
>
> (3) It may seem to be desirable to apply the idea of initiation by petition. This is provided for in the Constitution of Germany, and although probably it would not be used extensively, it would, in some circumstances, be of value.
>
> *Ratification.*—(1) Should a Council of States be created, it would be sufficient to secure agreement between the House of Representatives and that body. . . . Should a proposal made by the House of Representatives be rejected by the Council of States, or should a proposal made by the Council of States be rejected by the House of Representatives, the proposal should be submitted to a referendum poll for final decision.
>
> (2) If no alteration is to be made in the present composition of the Senate, it seems to be sufficient to obtain ratification of proposals to amend the Constitution from the legislatures of the States, not all of them, but, say, two-thirds of them, to ensure a sufficient majority. . . .
>
> (3) It might be thought necessary, in the event of the adoption of these provisions, to preserve the ultimate authority of the people by making provision for a referendum pôll upon the petition of a sufficient number of electors."

Mr. Eggleston suggested that the referendum should be retained for altering some provisions of the Constitution, *e.g.*, the distribution of powers and the constitution of the Senate, and that other provisions might be altered by an absolute majority in each House of the Parliament, though he recognised that it would be difficult to draw the line between the matters to which these two methods should be applied (evidence, p. 735).

It was also suggested by several witnesses that section 128 should be amended by making approval in the Commonwealth and in one half of the States sufficient.

Constitutional Convention.

The value of a constitutional convention as a means of altering the Constitution was stressed by several witnesses, including Sir Josiah Symon, Mr. Justice Piddington, Mr. Drummond, Mr. Eggleston, Mr. Melbourne, Mr. V. C. Thompson, M.P., and Mr. Windeyer, K.C. (evidence pp. 1083, 1086, 174, 1229, 1231, 735, 1543, 1133, 212). Sir Joseph Carruthers expressed a different view (evidence, p. 1336). It was suggested that the necessary provision should be made in the Constitution. It was thought that a representative convention on the lines

of the Convention of 1897-1898 could deal with matters which would be too numerous, as well as too disputable, to lend themselves to treatment at an ordinary referendum, and that such a convention would have the advantage of being composed of men who had experience of the working of the Constitution. A proposal for holding a constitutional convention was discussed by the Commonwealth Parliament in 1920, and a bill for that purpose was introduced in 1921 but was abandoned (P.D. Vol. xci., pp. 1233-1247, vol. xcviii., pp. 13019, 13472 *et seqq.*, 14260).

Methods of altering Constitutions.

An analysis is given in the evidence of Mr. E. S. Pratt (pp. 1198-1199) of the methods of altering the Constitutions of the United States of America, Canada, Germany, Mexico, Russia, South Africa, Switzerland, the Confederate States of America, the Leeward Islands, Brazil and Austria. These methods include alteration (*a*) by the combined action of the federal and state legislatures, as in the United States of America; (*b*) by special majorities in the federal legislature, as in Germany; and (*c*) by the referendum, as in Switzerland. In some Constitutions, as in the United States of America, Germany and Austria, a distinction is drawn between different classes of alterations, special provisions applying to certain matters, *e.g.*, the representation of States in the central legislature, and the alteration of the territory of a State.

According to the method adopted in practice in the United States of America, amendments are initiated at the instance of two-thirds of both Houses of Congress and take effect when they have been ratified by the legislatures of three-fourths of the States. There is an alternative provision, under which the legislatures of two-thirds of the States may request Congress to call a convention for proposing amendments, but this provision has not been used. Amendments initiated by Congress or proposed by a convention may be ratified either by the legislatures of three-fourths of the States or by conventions in three-fourths of the States, as the one or the other mode of ratification may be proposed by Congress.

The German Constitution of the 11th August, 1919, may be amended by legislation (Art. 76). For a decision by the Reichstag, which directly represents the people, two-thirds of the members must be present, and at least two-thirds of those present must give their consent to the proposed amendment. A decision of the Reichsrat, which represents the States, in favour of an amendment, also requires a majority of two-thirds of the votes cast. If the Reichsrat objects, it may demand that the measure be submitted to the people.

In Switzerland detailed provision is made for total and partial revision of the Constitution, but a change cannot be made until it has been submitted to the vote of the citizens and has been approved by a majority of those who vote, and by a majority of the Cantons.

Alterations suggested in the evidence.

The suggestions made by witnesses before the Commission included proposals to alter the covering clauses, to substitute a unitary scheme of government, and to alter the Constitution in various respects while preserving its federal character.

It was suggested that the Commonwealth should have further extra-territorial legislative powers, and that there should be no limits to the validity of a Dominion statute except for repugnancy to an Imperial statute expressly extending to the Dominion, or for not being relevant to the power to make laws for peace, order and good government of the Dominion.

Apart from the suggestions to introduce a unitary system of government, the proposals for altering the Constitution related, for the most part, to the organs and powers of the central government, the method of distributing legislative powers between the Commonwealth and the States, the financial relations of the Commonwealth and the States, the right of a State to pass laws with respect to the introduction from another State of diseased animals and plants, the method of establishing new States, and the method of altering the Constitution. In some instances verbal amendments were suggested with a view to greater clearness.

The suggestions in regard to the Commonwealth Parliament included proposals for extending the life of Parliament, increasing the number of members of the House of Representatives, removing disqualifications of a member of either House, substituting a Council of States for the Senate, prescribing additional qualifications for Senators, making adult franchise a part of the Constitution, prescribing special qualifications for electors of Senators, providing for the representation of minorities, prohibiting pre-selection of candidates, introducing the initiative referendum and recall and principles of direct government, giving the Parliament all powers not specifically assigned to the State Parliaments, and inserting constitutional guarantees in the nature of the prohibitions which are to be found in the American Constitution.

It was suggested that provision should be made for a Deputy Governor-General, and for the appointment of Lieutenant-Governors for the States by the Governor-General in Council instead of the appointment of State Governors by the King.

The suggestions as to specific powers and matters included suggestions in regard to the following:—Aborigines, agriculture, aviation, broadcasting and wireless transmission, censorship, cinematograph films, company law, "containers," courts, defence, drugs and foods, education, fauna and flora, fisheries, forestry, health, industrial matters, Inter-State Commission, marketing, navigation and shipping, negotiable instruments, new States, new subject-matters (*i.e.*, "matters which by reason of their nature were not matters of legislation before the passing of the Constitution Act"), office of profit under the Crown, partnership, probate and letters of administration, railways, ratification of international conventions, registration of doctors, dentists, pharmacists and nurses, registration of title to land acquired by the Commonwealth, revenue of the Commonwealth, social laws, State instrumentalities, State banking within the territory of an original State and of a new State formed by separation of territory from the original State, surrender of territory by the Commonwealth to a State, taxation, and trade and commerce.

The suggestions for making the Constitution more flexible by an alteration of section 128 have already been stated in this part of the report, and other suggestions have been stated or referred to in previous parts in connexion with the provisions of the Constitution to which they relate.

XXII.—GENERAL RECOMMENDATIONS.

General Recommendation in Favour of a Federal System.

Many definitions of Federalism, or of a Federal system, have been framed by writers on political science or constitutional law, but in recommending that the Federal form of government be retained in Australia, we are referring to a system which possess features common to the Constitutions of Australia, Canada, and the United States. Between the Constitutions of these three countries there are important differences, but all three have in common certain elements or institutions which may be described as fundamental. In all of them there is one central government having authority over the whole area, and there are a number of governments having authority over areas less than the whole. The powers of these governments and their relations to each other are limited and defined by a written document the terms of which cannot be altered by the Parliament either of the whole or of any lesser area. It cannot be interpreted except by a Court, and it is for this Court to determine whether any Act of any of the legislatures has the force of law, or is a nullity because it transgresses the limits defined by the Constitution. Another feature which these three systems have in common is that the powers exercisable by the Provincial or State Parliaments are not merely administrative, but are of sufficient importance to the people governed to attract political interest and to give to the decisions of the Legislatures or Executives of the States or Provinces an important influence on the well-being of the community. One distinguished writer on political science, Sir John Seeley, has denied that the difference between the Federal and unitary system is more than a difference of degree, the test in his opinion depending on the extent to which local government is carried. In some modern European Constitutions the powers of the provincial governments do not appear to be any greater than those that are assigned to local councils in unitary systems, such as that of South Africa or of the United Kingdom, but in recommending that the Federal system be retained in Australia we have in mind a system in which not only are the powers of the local and central legislatures defined by a charter but the powers of the local Legislatures and Executive Governments are substantial and significant.

Australia is one of the largest continuous areas in the world under a single government; it includes many varieties of climate and soil, its population is unevenly distributed and in four out of the six States more than forty-five per cent. of the population reside within the capital city or its suburbs. Large areas are very thinly populated, and of some it may safely be predicted that for a long period they will not be occupied by more than a very few people. The development of rural communications is still incomplete, and the legislation which has been enacted for the control of industrial conditions is still in an experimental stage. Partly because of this diversity in economic conditions and partly for historical reasons there are marked differences in interest between the peoples of the different localities, and there is a marked difference in outlook between the residents of the different capitals. There appears to be developing in Australia, as in other parts of the world, a feeling that the people in the cities and those engaged in primary production have divergent interests. There is also a

difference in outlook and in attitude of mind which may have originated in days when the States were self-governing units, but has not been obliterated by 28 years of Federation.

We think that the existence of these conditions furnishes a strong reason for the conclusion that the Federal system of government is the system best suited to the needs of the Australian people at the present time. A central authority is necessary for the discharge of those functions on which Australia should speak and act as a whole, *e.g.*, defence and relations with other countries, and is desirable for the exercise of powers of legislation and administration with respect to matters, *e.g.*, weights and measures and coinage, in which uniformity is convenient. But in our opinion the existence of self-governing units within the area of the Commonwealth is also necessary. The advantage of an independent right of self government may not be so obvious to the residents of those States which are in close touch with the central authority, but it is of fundamental importance to States which are situated at a distance from the seat of government, and which by reason of the sparseness of their populations have a relatively small representation in the Commonwealth Parliament. Where there are adequate powers of self-government, there is scope for public spirit, local patriotism, and local knowledge, which would be lost if all legislative and administrative functions in Australia were absorbed in the central government. Again, the existence of the self-governing States does, we believe, provide the best means of supervising development and the best safeguard against a disastrous experiment. The importance of confining economic and industrial experiments to limited areas was emphasized by several witnesses. It is obviously greater in Australia than in the United States where the Constitution contains prohibitions which restrain both Congress and State legislatures from legislating in certain directions.

We are aware that the division of powers must lead to some inconvenience and has often been found irksome by Ministers both in the Commonwealth and State Parliaments. But this difficulty may be diminished by a re-adjustment of powers in the light of the experience of the past 28 years, and it has been diminished to a very large extent by co-operation. If there had been further co-operation between the States and the Commonwealth, it is probable that the impression of the Constitution as an almost inflexible instrument would not have been formed. This conclusion appears to be supported by the history of the last constitutional amendment, but apart from the power of amendment the inconvenience attributable to a division of powers has been greatly diminished by co-operation in administration, *e.g.*, in health, in fisheries, in navigation, and in the control of railways, as well as by the operation of certain Commonwealth instrumentalities which work in conjunction with the States and are supported by the revenue or the credit of the whole of the Commonwealth.

Again, the division of powers may be said to lead to subdivision of political interest, but if this is an objection we do not think that it outweighs the advantages of local self-government. On the contrary it seems to us that the concentration of all legislative and executive functions in one authority would be likely to produce that paralysis at the centre and anaemia at the circumference which has been referred to by some writers on political science. The objection that in a Federal system the citizen feels a divided loyalty is an objection which might

be urged with equal force against the Constitution of the British Empire or of the United States. We think that the loyalty of a citizen finds its fullest scope, in a country of the size of Australia, when certain important functions are assigned to local authorities, and those which are truly national to the central government.

It is said that the advantages claimed for the Federal system could be obtained under a unitary government, the central Parliament having authority to delegate powers to provincial governments and to withdraw powers so delegated. There would be, we think, an inevitable tendency for the central Parliament to endeavour to retain for itself all powers except those of minor importance. We do not believe that the States with their present boundaries would attract suitable men to their service if their functions were seriously curtailed, and we do not think it possible to follow the example of the United States and divide the Commonwealth into a number of territorial divisions approximately equal in size. There must always be many areas in Australia which cannot be developed except when supported by the capital or the credit of those more closely settled, and there are always likely to be cities which contain within themselves a population exceeding that of any rural State. The existence of these large cities on the one hand, and of large and sparsely inhabited areas on the other, appears to us to render the division of Australia into a large number of small provincial areas impracticable. At the same time we regard as undesirable the establishment of a number of areas as Federal Territories dependent on the central authority.

We do not recommend the substitution for the Australian Constitution of a Constitution containing a division of powers similar to that of the Dominion of Canada. The confusion resulting from two sets of enumerated powers is pointed out elsewhere in this report in a passage cited from the evidence of Sir Robert Garran. By some witnesses, however, the Canadian system was referred to as a system in which the residuary powers are vested in the central government, no reference being made to the two sets of enumerated powers. Although inconveniences may result under the Australian system when a new subject of power, such as aviation, comes into existence, we think on the whole that it is more convenient that the enumerated powers which are expressed in wide and general terms should be conferred on the central government and that the unspecified powers should remain with the States. Difficulties of interpretation would, it seems to us, arise if both enumerated and residuary powers be conferred on the Commonwealth. In forming an opinion of the sufficiency of the powers of the central government it seems to us necessary to have regard not so much to the residue as to the extent of the powers which are carved out of the residue.

It has been suggested that the cost of government is increased by the existence of the several Parliaments in Australia. We are of opinion that under a unitary system it would be necessary to have a much larger Parliament, and to have provincial councils and provincial heads of departments, and that the total cost of government under Federation is not higher, and may be less, than it would be under a unitary system.

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the general recommendation of Mr. Ashworth, Mr. Duffy and Mr. McNamara see pp. 243-247.

General Recommendation of Mr. Ashworth, Mr. Duffy and Mr. McNamara in Favour of the Concentration of Power and Responsibility in the National Parliament.

The terms of the reference embodied in the Royal Commission require us to report on the nature and extent of the control which should be exercised by the Commonwealth over various elements in our national life. We dissent from the view of the majority of the Commission on this main issue.

We find it impossible to arrive at separate disconnected conclusions in respect of each of these compartments of national activity. We believe that logically we should first formulate the conclusion at which we have arrived, as the result of the evidence submitted to us and our deliberations thereon, as to the major and determining problem of where the sovereign power of the people of Australia should reside. Subordinate problems of how that power should be exercised depend for their solution upon the answer to the major problem. The adoption of this course immediately raises the item of "New States," one of the questions specially referred to the Commission, to its proper position as involving and carrying with it the answers to many other items. We believe that the question of new States cannot be determined without considering the question of a general redistribution of governmental powers between the Commonwealth and local bodies (whether called States or Provinces). Consequently our recommendation on the item New States must at the same time supply our answer to the questions raised as to the allocation of governmental powers in respect of any and all national activities.

In framing our recommendation upon the major problem abovementioned we are particularly desirous of avoiding at the outset the misunderstanding that inevitably arises when terms of uncertain meaning are used such as "Unification" or "Federalism". We do not accept either of these terms as applying to the system of government outlined herein. In the *Introduction to Political Science* Sir John Seeley shows how the views and conclusions of many people are governed by abstract words which have but little correspondence with the facts of life. He shows how impossible it is to draw a clear line between Federal and Unitary systems of government. In this regard he writes:—

> "Against the common way of conceiving this distinction I have the same sort of objection that I have to distinctions of monarchy, oligarchy, and democracy; it is too purely formal and verbal. . . . . Compare the union of the States in the United States with the union of the boroughs and counties in the English State or of the departments in the French State. There is great difference in the degree, but no fundamental difference in the kind of union. . . . . I deny, then, that between the unitary State and the Federation or Federal State there is any fundamental difference in kind" (Sir J. R. Seeley, *Introduction to Political Science,* 1896, pp. 93-95).

Next our attention is arrested by observing that there are several of the major sides of national life now partly or wholly vested in the States as to which the interests of all Australia are uniform and indissolubly interconnected, and the control and regulation of which should certainly be the function of the national Parliament only. Apart from

the profound question of the effect of a uniform system in moulding a consistent national outlook referred to hereinafter, there is the enormous practical advantage that where legislation imposes a charge upon industry, this charge will be uniform throughout the continent. We refer particularly to the body of laws regulating the relations of employer and employee; and as it is difficult and hampering to industry to separate interstate from intra-state trade and commerce, to the whole body of laws relating to trade and commerce, including company laws, laws as to banking, standards of commodities, carriage of goods, &c.

The arbitrary line drawn across trade and commerce making interstate matters subject to the control of one Parliament and intra-state the subject of control by another Parliament must produce uncertainty as to the limits of one power or the other. A considerable amount of legal decision surrounds this question, and is fully discussed in section xiv. of this report; but notwithstanding all this it is difficult to say where interstate trade begins and ends. When a subject matter is divided in this manner and produces uncertainty and difficulty of interpretation the only logical thing to do is to place the whole undivided power in the hands of one authority; and since the control of interstate trade cannot be carried out by State or local authorities, there is only one place where the power can be satisfactorily placed, and that is in the hands of the central Parliament.

Trains and boats travelling from one State to another are engaged in the transport of goods for intra-state as well as interstate trade. The futility of the attempts by the Courts to separate trade and commerce into two areas was set out in a speech by Mr. W. H. Irvine (now Sir William Irvine, Chief Justice of Victoria) in the House of Representatives in 1910. The following extract from that speech refers to the American cases on the trade and commerce power (evidence, p. 1105) :—

> "These would sometimes make even a lawyer's head reel with confusion in the endeavour to follow the intricacies to which the Courts are reduced in trying to divide what is really and substantially an indivisible whole—to divide the commerce of the community into parts, and to say that one part shall be under the government of one Parliament, and another part under another Parliament. Commerce is really an organic whole, and an organic whole of continually increasing complexity".

Not only is trade and commerce one and indivisible; there are several powers which are so closely interwoven that any attempt to separate them by giving the control of some to the Commonwealth and others to the States can result only in confusion and economic loss. Customs duties, trading conditions and conditions of employment are all so interdependent—reacting so powerfully each upon the other—that they should be placed under the same governmental control. Since the Commonwealth necessarily controls the customs, we believe that full trade and commerce, company law, shipping, navigation, and industrial powers should be vested together in the central government.

Special reference must be made to industrial powers. The extent of the existing power has been the subject of much legal argument and progressive interpretation. Both the Arbitration Court and High Court decisions have changed with the changing personnel of those bodies. If the power is removed from the Commonwealth and vested in the

States, an intolerable condition of unfair competition between manufacturers in different States owing to varying rates of pay and conditions of employment will be created. One of the benefits of a central government is that it can remove danger of this character. That the danger is real is demonstrated by a resolution of the Premiers' Conference of 1909 as follows:—

> (3) "That to meet the case where it is proved that interstate competition exists in industrial matters which is unfair, and the State tribunals have failed to grant relief, the Parliament of the States should agree to vest the Commonwealth with the power to adjust the grievance complained of".

When the various parts of Australia became separate colonies, communication was difficult and intercourse between them was very limited. The position is now different, communication being rapid and intercourse considerable, making the problems of commerce and industry of nation-wide importance. The establishment of new States would make this aspect more pronounced, and the Constitution should be so modelled as to be ready for this change.

Evidence before the Commission indicated the desirability of uniform laws and standards upon many subjects such as company law, standards of foods and drugs, &c. Efforts have been made to secure the passing of uniform Acts by all the State Parliaments. Results have not been satisfactory. Even when successful, the delay and waste of effort involved in securing passage through eleven Houses of Parliament could be avoided by endowing the central Parliament with the necessary power. Administration could in many cases be left to local bodies.

The present division of powers has led to a considerable amount of litigation in order to ascertain exactly what the words in the Constitution mean. The economic waste entailed by taking constitutional questions to the Courts is a heavy burden on the people. What is required is a Constitution simple as it is possible to make it so that the people can readily understand it without the necessity for High Court interpretation. The present position is such that the Commonwealth Constitution is broad or narrow according to the way it is construed by the High Court, and the Constitution depends upon the trend of thought of the individuals who for the time being form that body. The personnel of the Court has been changed recently, and it is possible that some decisions now standing and accepted as the law of the Constitution may be upset in the future. Such uncertainty should be ended and the remedy appears to be to entrust the Commonwealth Parliament with the necessary powers, rather than to trust to the accident of the occupancy of a High Court Bench lacking in the responsibility of a Parliamentary Legislature. We believe that the authority of the Commonwealth Parliament as a law-making body has been impaired by the paramount and incalculable power of the High Court in its capacity as arbiter of the powers, and that the responsibility of Parliament and of the Cabinet have been lessened accordingly. Moreover, we believe that the adjudication of political issues by the Court is tending to lessen the Court's prestige, decreasing popular respect for it as an instrument of justice. These evils spring from the uncertainty of and the absence of definite principle in the distribution of powers.

Under the system of dual authority operating at present political parties are enabled to make promises the non-performance of which can be excused on the ground of constitutional limitations. If the Commonwealth Parliament had complete power, these unfair vote-catching tactics would not be possible. The parties and the people would know that whatever the majority of electors voted for would come within the legislative competency of Parliament. Those making the promises would do so with a sense of responsibility that is precluded by the existing division of powers.

The division of powers leads inevitably to over-government. Each authority is desirous of enlarging its own sphere. The manner in which the conflict develops is illustrated in Australia in connexion with the industrial power. With sovereign power concentrated in one government a more reasonable exercise may be looked for.

The association of power and responsibility is fundamental in the British Cabinet system; it is the life principle of civilization. The dual authority of Commonwealth and States limits and restrains the sovereign power; it divides it; it assigns to government only specified and limited rights. Consequently, it lessens responsibility. To this defect we attribute many existing political and economic ills.

In the light of these considerations we are of opinion that the most suitable form of government for Australia is one that provides for all major national questions being dealt with by the central Parliament and that leaves matters of minor importance, as well as the administration of federal laws to a considerable extent, to local bodies (States or Provinces). We, therefore, recommend that full powers such as those embodied in the Constitutions of Great Britain, New Zealand, and South Africa be vested in the Commonwealth Parliament. This alteration will necessitate the empowering of the Parliament to amend the Constitution how and when it finds it necessary for the construction and alteration of its laws. The flexibility thus obtained will enable Parliament to make those modifications in detail which are demanded from time to time by the ever-changing conditions of modern life, modifications which in the aggregate count for so much in promoting the social and economic welfare of the people. Moreover this flexibility will enable the transfer of powers from States to Commonwealth to be accomplished gradually, as and when necessary and desirable.

To grant full legislative power to the Commonwealth Parliament by a complete and sudden amendment of the Constitution would be to put the whole of the powers of the States into the melting pot at once, and until such time as the Commonwealth had conferred delegated powers to local authorities there would be interruption of the services now performed by State Parliaments and Departments. The proposal submitted in this recommendation would remove all danger of the chaos indicated. If the suggested amendment of the Constitution were adopted by referendum, the Commonwealth Parliament would be enabled to amend from time to time such parts of the Constitution as it desired to operate, leaving the balance to the State or local authorities. Gradually, without upsetting the smooth working of the Parliamentary machine, the national Parliament would be invested with full control over the matters that the people desired. Broad national questions could then be fully dealt with by the Commonwealth Parliament and purely local

affairs by local bodies. Overlapping and duplication would cease. Where to-day there are two laws and two sets of regulations covering the same spheres of legislation and administration, one would suffice.

Opponents of full powers for the Commonwealth fear undue centralization of all governmental activities. There is no ground for this fear in the practice of other countries. In all systems of government certain functions must be discharged by a central authority; others must be decentralized. We believe that under such a system as is outlined herein the existing States would be subdivided into smaller units of local government, not so small however as to be left without important functions. Powers over local development such as irrigation, harbours, roads, hydro-electricity, forestry, and land tenure for any purpose, together with the control of health, education, local courts, municipal government and police would almost certainly be delegated by the central authority to local bodies (States or Provinces).

Whereas the existing States include widespread areas with conflicting interests, these smaller units could be based upon community of interest. Consequently, there would be more scope than at present for local patriotism, local knowledge, and public spirit.

We believe that the prosperity and development of Australia calls for a redistribution of the areas of existing States—for the creation of new States. Evidence has been submitted to the Commission, to the effect that the State boundaries have not been planned in accordance with any principle; they are mere historic accidents; they bear no relation to community of interest; they are not natural. Communication between country districts and the seaboard is restricted by these artificial boundaries. The system of government that we are advocating would remove the existing constitutional hindrances to the creation of new States. It would open up the way for a more judicious centralisation and decentralisation of the functions of government than is possible under the existing Constitution.

Despite some surface indications to the contrary, we believe that the Australian people are in a specially favourable position to achieve a consistent national outlook. We are nearly all of one race; approximately 98 per cent. of our people are British; the great need is a constitution which will tend to still further develop national ideals. The Constitution of 1900 was a big step in the right direction. We record our conviction that the time has arrived for placing full power and responsibility in the national Parliament as the means of achieving social unity.

The supplementary views and individual recommendations of Mr. Ashworth are set out at pp. 277-293, and those of Mr. Duffy and Mr. McNamara at pp. 301-304.

T. R. ASHWORTH.
M. B. DUFFY.
D. L. McNAMARA.

XXIII.—SPECIFIC RECOMMENDATIONS.

Aviation.

We recommend that a power to make laws with respect to aviation be conferred on the Commonwealth Parliament.

All the expert witnesses on this subject who appeared before the Commission were agreed that the Commonwealth should have this power, and as is shown elsewhere in this report the State Premiers at one time passed a resolution that it was desirable that the power to make laws with respect to aviation, with certain reservations, should be transferred by the States to the Commonwealth.

Effect could, we think, be given to this recommendation by inserting in section 51 of the Constitution the following paragraph:—

(*vib*) Air navigation and aircraft.

Sir Hal Colebatch.—For the views of Sir Hal Colebatch see section xxiv., p. 298.

Industrial Powers.

We do not recommend that the Commonwealth Parliament be empowered to legislate with respect to industrial matters generally. In our opinion, the reasons which may be urged against the abolition of the Federal and the establishment of a unitary system of government in Australia may be urged against the transfer of this power to the Commonwealth. In our opinion, industrial legislation should be regarded as a function of the States. In many matters industrial legislation is experimental, and each State should decide for itself whether it is prepared to test the value of proposed legislation of this character and to accept the responsibility for its consequences. We also think that industrial legislation peculiarly requires local supervision, and should be in the hands of the authority which is responsible for the maintenance of law and for the good order of the community. We think, further, that the general power to legislate with respect to industrial matters should be in the hands of the legislature which has the general power to deal with health, trade and commerce, mines, lands, public works, and the development of a State. We do not think that it would be for the good of Australia that the Commonwealth Parliament should be occupied with industrial questions or that Federal elections should turn on industrial issues.

In our opinion paragraph (xxxv) of section 51 of the Constitution, which relates to conciliation and arbitration, should be deleted. We think that the Parliament which deals with industrial arbitration and conciliation should be the Parliament which has control of industrial matters generally. For the reasons given above we think that this control should be in the hands of the Parliament of each State.

We think that the history of the decisions on this paragraph shows (1) that the arbitration power, however exercised, should not be dissociated from the power to legislate on industrial matters; and (2) that there would be great difficulty in framing a definition of dispute which would ensure that only real disputes, in the sense in which that term was used in the earlier judgments of the High Court, were brought before the Commonwealth Court.

We are of the opinion that the arbitration power should not be exercisable by two authorities, and that it should be in the hands of the States and not of the Commonwealth.

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the views of Mr. Ashworth, Mr. Duffy and Mr. McNamara, see section xxii., pp. 243-247.

The Inter-State Commission.

Section 101 of the Constitution provides that there shall be an Inter-State Commission, and we recommend that the Inter-State Commission be re-constituted.

The duties of the Inter-State Commission are set out in sections 101 and 102 of the Constitution, but these sections are not exhaustive. By section 101 it is provided that the Inter-State Commission shall have such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance within the Commonwealth of this Constitution relating to trade and commerce and of all laws made thereunder. By section 102 it is provided that no preference or discrimination, by any State or by any authority constituted under a State, as to railways, is to be taken to be undue and unreasonable or unjust to any State unless so adjudged by the Inter-State Commission. Although preferences or discriminations by means of freights on railways have to some extent been adjusted by agreement among the Railway Commissioners, we think that there is still need for some supervision over freights designed to attract goods from their natural geographic or economic outlets.

We are also of opinion that there is scope for the work of an Inter-State Commission in carrying out the inquiries and investigations enumerated in the Inter-State Commission Act of 1912 referred to on page 54 of this report, or such other inquiries and investigations as might be substituted or added, and in exercising the powers of adjudication conferred by that Act, which may be validly conferred if sections 71 and 72 of the Constitution, relating to the tenure of judges of courts created by the Commonwealth Parliament, are amended as we recommend.

We think that important duties may be carried out by an Interstate Commission in addition to those mentioned in the Constitution and in the Act of 1912. In the section of this report dealing with the financial relations of the Commonwealth and the States (section xix.), reference is made to the sums of money granted from time to time to the States of Western Australia and to Tasmania, and to the grant to South Australia recently recommended by a royal commission. These grants were recommended partly on the ground that the finances of a State had been adversely affected by Federation and partly on the ground that the State was in financial difficulties. We think that a permanent body should be established which should continuously watch the effect of Federal laws and administrative machinery on the various States, and should be in a position to advise, either with or without a special inquiry, whenever applications for grants are made to the Commonwealth.

The same permanent body should, we think, inquire into and report on such transactions as the agreement between the Governments of the Commonwealth and of the State of Queensland relating to the purchase and disposal of the sugar crop and the embargo on imported raw sugar, and inquire into and report on proposed bounties, and the effect of the Navigation Act on the various States.

The advantage of the establishment of such a body for these purposes would, we think, be twofold. There would be a tribunal in existence equipped with a knowledge of Australian conditions and of the working of the Federation, and the claims of necessitous States would no longer afford an opening to the benevolence or the opportunism of political parties. An analogy may be found in the position of the Public Works Committee in the Commonwealth and in some of the States. Public works costing more than a prescribed amount will not in normal circumstances be sanctioned by Parliament unless favourably reported on by the Public Works Committee, and in our opinion it would be to the advantage of the Federation if it were provided by law that grants under section 96 were not to be made unless first recommended by such a body as the Inter-State Commission.

In making these recommendations we have not overlooked the fact that some of the duties originally assigned to the Inter-State Commission have been carried out by other bodies, and that very important duties are now carried out by the Development and Migration Commission. As has been pointed out elsewhere in this report the value of an Inter-State Commission has been acknowledged by the royal commission which inquired into the finances of Western Australia and by that which inquired into the finances of South Australia. We do not think that the reasons for the opinions expressed by these royal commissions have been diminished by the proposed appointment of an economic adviser by the Commonwealth.

In this connexion we would also draw attention to the provisions of the Industrial Peace Act relating to the appointment of an Industrial Council, and to the evidence in favour of the appointment of an Industrial Council or Parliament given by Mr. Kneebone and Mr. Sutcliffe, and to the suggestion by Professor Cumbrae Stewart that a committee be appointed for the purpose of bringing about uniformity in State laws. Certain of the functions of the Industrial Council which might be of great value to the Commonwealth might well be carried out by the Inter-State Commission, and the same body might perform a valuable duty in bringing about uniformity in the laws of the State, particularly in the commercial laws.

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the views of Mr. Ashworth, Mr. Duffy and Mr. McNamara, see section xxii., pp. 243-247.

Judicial Power.

Removal of difficulties without curtailing the authority of the High Court.

From the section of this report under the heading of "the High Court and the Judicial Power of the Commonwealth" (section ix.), it will be seen that a number of difficulties and anomalies have arisen in the administration of justice in the Commonwealth, and

that the causes of these difficulties and anomalies are to be found partly in the provisions of chapter III. of the Constitution and partly in the manner in which the Parliament of the Commonwealth has exercised the powers conferred on it by that chapter. In our opinion it is desirable that alterations be made in chapter III. of the Constitution which, without curtailing the authority of the High Court, will of themselves remove certain of these difficulties, or will remove the causes which have impelled the Parliament to legislate with results described in the extracts from the evidence set out on pages 99–110 of this report.

Sections 71 *and* 72. *Life tenure of judges.*

The first class of difficulties arises from the combined effect of sections 71 and 72 of the Constitution, which have been interpreted so as to prevent any tribunal established by the Commonwealth Parliament from exercising any judicial functions unless the members of that tribunal are appointed for life.

We think that it may at any time be convenient for the Commonwealth to have power to establish a tribunal for a specified purpose and to appoint the members for a specified term. In our opinion, power should be conferred on the Commonwealth Parliament to establish such tribunals and to fix the term for which the members are to be appointed. We think that the provisions of section 72 with respect to mode of removal and to remuneration, which are designed to secure the independence of courts created by the Parliament as well as of the High Court, should apply to a tribunal established by the Parliament, whether the tenure is for life or for a specified term. We also think that any alteration of the Constitution for the purpose of conferring on the Parliament power to fix a term for which the members of the tribunal are to be appointed should be accompanied by a provision empowering the High Court to grant leave to appeal from decisions of the tribunal, if the High Court thinks that leave should be granted. Such a provision would, we believe, prevent the authority of the High Court as the interpreter of the Constitution from being displaced or curtailed by legislation.

In our opinion, life tenure should be retained for the Justices of the High Court, subject to a provision in the Constitution fixing an age for the retirement of any future Justices. A similar question was carefully considered in England by a royal commission which was appointed to inquire into certain matters in connexion with the King's Bench Division and whether any reforms should be adopted, and which presented its report on the 28th November, 1913 (cd. 7177). That Commission recommended that future Judges of the King's Bench Division should be required to retire on attaining the age of seventy-two years or after an absence of more than six months from the sittings of the Court, unless requested to continue in office for a period to be named by a committee, consisting of the Lord Chancellor and certain other members of judicial eminence. Dr. Brissenden, K.C., who presented a memorandum from a joint sub-committee of the Bar Council and of the Incorporated Law Institute of New South Wales, expressed the view that, while life tenure should be maintained in the case of Judges of the High Court, the tenure should be subject to a provision for some retiring age (evidence, p. 1120). On the other hand Mr. Owen Dixon, now Mr. Justice Dixon,

gave reasons why a life tenure for judges is desirable, and expressed an opinion against fixing any retiring age (evidence, p. 782). A similar view, at least as regards the tenure for Justices of the High Court, was expressed by Sir Josiah Symon and Mr. Inglis Clark, now Mr. Justice Inglis Clark (evidence, pp. 1085, 932), while Sir Edward Mitchell stressed the difficulty of laying down any general rule (evidence, p. 764). Legislation has been enacted in New South Wales and Queensland under which a judge retires on attaining the age of seventy years, subject to a proviso in New South Wales that if he is granted retiring leave, he is to retire on the expiration of the leave.

We recommend that the retiring age for future Justices of the High Court should be fixed at seventy-two years.

Effect could, we think, be given to our recommendations in regard to tribunals established by the Commonwealth Parliament, and in regard to a retiring age for the Justices of the High Court, by amendments of sections 72 and 73 of the Constitution. The suggested amendment of section 73 will be dealt with under the next heading "Section 73," though, as already indicated, our recommendation that the Parliament should be empowered to fix the term for which the members of tribunals established by it are to be appointed, is dependent on our recommendation that the High Court should be empowered to grant leave to appeal. The suggested amendment of section 72 might, we think, be made by inserting at the end of the section the following paragraphs:—

> The Justices of the High Court shall be appointed for life, and shall retire on attaining the age of seventy-two years, but this provision shall not apply to any Justice appointed before the day of .
>
> The Justices of any Court created by the Parliament shall be appointed for such term as the Parliament may fix.

Mr. Ashworth.—Mr. Ashworth does not concur in the first paragraph of this suggested amendment.

Section 73. Appellate jurisdiction of the High Court.

It is, we think, important that the High Court should be at liberty to grant special leave to appeal from the decisions of any court created by the Commonwealth Parliament, if the High Court is of opinion that such leave should be granted.

Under section 73 of the Constitution the High Court is to have jurisdiction to hear and determine among others (*a*) appeals from any Justice or Justices exercising the original jurisdiction of the High Court, and (*b*) appeals from any other federal court, or court exercising federal jurisdiction. This appellate jurisdiction of the High Court is subject to such exceptions as the Parliament prescribes, though no exception is to prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lay from the Supreme Court to the Queen in Council.

It may be noted that, by section 21AA of the Conciliation and Arbitration Act, the Parliament has exercised the power to prescribe

exceptions to the appellate jurisdiction of the High Court, but that the Justices have overcome the difficulty arising from the absence of any right of appeal by referring doubtful questions to the Full Court.

We think that the paragraph of section 73 which limits the power of the Parliament to prevent appeals to the High Court, should be extended to cover any case in which the High Court may see fit to grant special leave to appeal from any Justice or Justices of the High Court or from any other federal court or from any court exercising federal jurisdiction.

We have already recommended under the preceding heading "Sections 71 and 72" that the Parliament should have power to establish tribunals for specified purposes and to fix the term for which the members of those tribunals are to be appointed, provided that the alteration of the Constitution conferring that power is accompanied by a provision empowering the High Court to grant leave to appeal.

Effect could, we think, be given to our recommendation in regard to section 73 of the Constitution by adding at the end of the paragraph beginning "But no exception or regulation prescribed by the Parliament" the following words:—

> "or from hearing and determining any appeal, if the High Court shall see fit to grant special leave of appeal, from any Justice or Justices of the High Court or from any other federal court or from any court exercising federal jurisdiction."

Section 74. *Appeals on constitutional questions.*

A number of witnesses, including Mr. F. W. Eggleston, Sir Henry Barwell, and Mr. W. A. Holman, K.C., urged that it was desirable that there should be a right of appeal to the King in Council from a decision of the High Court on questions as to the limits *inter se* of the powers of the Commonwealth and the States, and Sir Edward Mitchell, K.C., expressed the opinion that if a right of appeal to the King in Council were permitted on all constitutional questions, there would be a greater uniformity in the interpretation of the Constitution, and counsel would be able to advise on constitutional questions with greater certainty than they can at present. We are of opinion that greater uniformity in constitutional decisions would be welcomed not only by prospective litigants but by the legislature, and we may add that the value of an appeal on questions between the States and the Commonwealth to a tribunal external to Australia was emphasized in the debates in the House of Lords when the Constitution Bill was before the Imperial Parliament. We are of opinion, however, that Australian sentiment is now, as it was claimed to be at that date, in favour of confining the right of interpreting the Constitution to the High Court of Australia, and would on the whole be opposed to granting an unrestricted right of appeal to the Privy Council.

The Constitution restricts appeals from the High Court to the Privy Council, and empowers the Parliament to enact further restrictions, subject to the proposed law being reserved for the royal assent, but it does not restrict appeals from the Supreme Court of a State to the Privy Council or directly empower the Parliament to enact restrictions in regard to such appeals. In any matter, however, in which the High Court has original jurisdiction under section 75, or in which

the Parliament may confer original jurisdiction on the High Court under section 76, the Parliament may, by exercising the powers conferred on it by section 77, preclude appeals from the Supreme Court of a State to the Privy Council. The matters in which the Parliament may do this include matters arising under the Constitution or involving its interpretation. In having recourse to section 77 for the purpose of precluding appeals from the Supreme Court of a State to the Privy Council on constitutional questions, it appears to be inevitable that difficulties will be created in the administration of justice, as they have been by the provisions of the Judiciary Act already quoted. We think that these difficulties should be avoided by an amendment of the Constitution precluding appeals from the Supreme Court of a State to the Privy Council on constitutional questions.

Effect could, we think, be given to this recommendation by inserting at the beginning of section 74 of the Constitution the following paragraph:—

> "No appeal shall be permitted to the Queen in Council from a decision of the Supreme Court of a State upon any question, howsoever arising, involving the interpretation of this Constitution".

In drafting the amendment it seems to be convenient to use the words "Queen in Council" in view of the definition in covering clause 2 and of the fact that those words are already used in section 74 of the Constitution.

Section 75. Original jurisdiction of the High Court.

We think that section 75 of the Constitution should be amended by deleting paragraphs (i) and (ii), and portion of paragraph (iv). If these amendments are made, the matters in which the High Court is to have original jurisdiction under that section will be (*a*) matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; (*b*) matters between States; (*c*) matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

We recommend that these amendments be made, partly in order to secure greater clearness and to avoid confusion, and partly because, in our opinion, the provisions proposed to be deleted are not required in the Australian Constitution, as some of them were, or were supposed to be, in the American Constitution (see section ix., pp. 102-104).

Paragraph (i) relates to matters arising under a treaty. In Australia, it is not clear what matters can arise under a treaty. This paragraph would have an application in the United States of America; but it is doubtful whether it could have any application in Australia.

Paragraph (ii) relates to matters affecting consuls or other representatives of other countries. This paragraph may lead to confusion, as it is not clear what are matters affecting consuls or other representatives of other countries.

Portion of paragraph (iv) relates to matters between residents of different States, or between a State and a resident of another State. There does not seem to be any necessity for this paragraph in the Australian Constitution. The historical reasons for its insertion in

the Constitution of the United States are discussed in the decision of the High Court in *Australasian Temperance and General Mutual Life Assurance Society* v. *Howe* (31 C.L.R. 290). Further, it is an anomaly that jurisdiction should be conferred over individuals which is not exercisable over companies, if any reasons exist for retaining this jurisdiction. The difficulties of defining the residence of a company are set out in the decision above quoted, as well as in the recent decision of the House of Lords in *Egyptian Delta Land and Investment Co. Ltd.* v. *Todd* (1929 A.C. 1).

Advisory Opinions.

Different views were expressed before the Commission on the question whether it is desirable that the High Court should have power to give advisory opinions. The witnesses who were in favour of an amendment of the Constitution for that purpose included the late Mr. Justice Higgins, Sir Robert Garran, and Dr. Brissenden, the last named presenting a memorandum from a joint sub-committee of the Bar Council and of the Law Institute of New South Wales, while the witnesses who expressed opinions against such an amendment included Mr. Owen Dixon, now Mr. Justice Dixon, and Mr. Inglis Clark, now Mr. Justice Inglis Clark, who was a member of a committee of the Southern Law Society of Tasmania which prepared memorandums for the Commission (evidence, pp. 438, 59-60, 1,120, 791, 932). In our opinion the advantage of having the advice of the High Court upon the validity of legislation before the community incurs the trouble and expense of acting upon legislation which may or may not be valid outweighs the objections to any judicial pronouncement being made as to the validity of legislation except in regard to a concrete case in litigation instituted between parties.

Provision is made in Canada for advisory opinions (Revised Statutes of Canada, 1927, c. 35, s. 55), and a provision of this nature was inserted in the *Government of Ireland Act,* 1920 (s. 51).

We recommend that the Commonwealth Parliament should be empowered to authorize the High Court to give opinions as to the validity of Commonwealth or State legislation, without fettering the discretion of the Court to abstain from giving an opinion where such a course appears to the Court to be desirable. We think that requests for advisory opinions should be restricted to questions relating to enactments actually made by the Commonwealth or a State, and that the Court should not be asked to give opinions on bills or abstract questions. Where it is desired to have the opinion of the Court before an Act comes into force there will presumably be no difficulty in passing the Act with a provision that it is not to come into force until a day to be proclaimed by the Governor-General or by the Governor of a State, as the case may be, or with such suspending clause as may be thought proper.

Effect could, we think, be given to this recommendation by inserting at the end of chapter III. of the Constitution the following section:—

> "80A. Notwithstanding any other provision of this Constitution the Parliament may make laws authorizing the High Court to advise as to the validity of any enactment of the Commonwealth or of any State."

Sir Hal Colebatch.—For the comments of Sir Hal Colebatch, see section xxiv., p. 300.

Mr. Duffy and Mr. McNamara.—Mr. Duffy and Mr. McNamara think that the High Court should be the final court of appeal in all cases. For their views, see section xxiv., p. 304.

Navigation and Shipping.

In our opinion the requirements for coastal navigation should be the same whether the ships navigated trade between one or more States or along the coast of one State only. Further, we are of opinion that the administration of the laws relating to navigation should be under one central authority, adequate provision being made for a decentralized administration and the subordinate officers having an adequate discretion. We fully accept the evidence of a number of expert witnesses to the effect that the State and Federal authorities have worked harmoniously, but we think that there should not be the opportunity for friction and for overlapping which must exist under the present method of control. Further, we are of opinion that there should not be any room for the doubts which have arisen as to the laws under which an offence may be punishable, or as to the authority which may appoint courts of inquiry, which have arisen in a number of recent cases referred to by witnesses before this Commission.

We recommend that the Commonwealth Parliament be empowered to legislate with respect to navigation and shipping.

Effect could, we think, be given to this recommendation by inserting in section 51 of the Constitution the following paragraph:—

(v*ia*) Navigation and shipping.

Colonel Abbott and the Chairman.—Colonel Abbott and the Chairman think that it should be made clear that the power of the Commonwealth Parliament to legislate with respect to navigation and shipping will not include intra-state trade, commerce or industry carried on by shipping.

Sir Hal Colebatch.—For the views of Sir Hal Colebatch see section xxiv., p. 299.

New States.

We recommend that an alternative method of creating new States should be provided in the Constitution so that in a proper case a new State may be created out of an existing State without the consent of the State Parliament. We think, however, that the whole of the people of a State, and not merely the people of an area which is to be included in a new State, are vitally interested, and that the new State should not be established until an opportunity has been given both to the people of the area and to the people of the State to express their wishes at a referendum.

The proposal should, in our opinion, be initiated by a petition to the Commonwealth Parliament from at least twenty per cent. of the electors of an area which is not less in extent than the State of Tasmania.

If the Parliament sees fit to take action, we think that a commission should be appointed to determine the boundaries of the proposed new State, regard being had to the boundaries mentioned in the petition, community of interest, physical features, existing boundaries of States and other relevant matters, and that if the Parliament approves of these boundaries it should determine the terms and conditions upon which it is prepared to establish the new State.

The Parliament should, we think, make the necessary provision for the holding of a convention, the members to be elected by the people of the area. The convention would have the task of framing a constitution for the new State. The constitution should include provisions for the transfer to the new State of assets used in connexion with any department or branch of the public service of the existing State which is to be transferred to the new State, and provisions for adjusting the financial relations of the new State and the existing State. The convention should be empowered to submit proposals to the Parliament for a variation of boundaries and for a variation of the terms and conditions on which the Parliament is prepared to establish the new State. The convention should also be empowered to consider any variation of the proposed constitution which the Parliament may require before it is willing to take further steps.

After the constitution and boundaries of the new State have been finally approved by the Parliament, an inquiry should, we think, be held by a competent body with instructions to investigate the circumstances of the area, the value of the assets that are to be transferred to the new State, and such other matters as the Parliament may deem proper, in order that the people of the area and of the existing State may have the requisite information before recording their votes for or against the proposal to establish the new State.

At the referendum the electors should, we think, be asked whether they are in favour of the new State being established upon the terms and conditions and with the constitution approved by the convention and by the Parliament.

If the voting in the area and in the State is in favour of the proposal, it may, we think, be assumed that the Parliament would give effect to the wishes expressed by the electors, and it is, in our opinion, desirable that Parliament should have power to make any necessary or convenient provision, including the fixing of the date, for the actual establishment of the new State.

If the voting in the area is in favour, and the voting in the State is against the proposal, the Commonwealth Parliament should have power to decide within a specified period whether the new State is to be established, provided at least sixty per cent. of the votes cast in the area, and at least forty per cent. of the votes cast in the State are in favour of the proposal.

In stating our views as above, we have for conciseness referred to the creation of a new State out of one existing State, but our suggestions are intended to apply also to the creation of a new State out of parts of two or more existing States, and to apply separately in respect of each State or part of a State. Two or more States or parts of States should not, in our opinion, be considered as one State or area for the purposes of the petition by which the proposal is to be initiated or for the purposes of the referendum.

Effect could, we think, be given to our recommendation by omitting from section 124 of the Constitution the words "but only" after the words "a State" and also after the words "parts of States," and by inserting after section 124 the following section:—

124A. Notwithstanding any other provision of this Constitution a new State, having a territory not less than the territory of the State of Tasmania, may be formed by separation of territory from a State, or by the union of parts of two or more States, in the following manner:—

The proposal for the establishment of the new State shall be initiated by a petition to the Parliament signed by one-fifth at least of the electors in the territory of the proposed new State, provided that where the territory includes parts of two or more States the petition shall be signed by one-fifth at least of the electors in each part.

The Parliament may, by resolution of each House, direct such inquiry to be made as the Parliament thinks fit in order that it may determine, with due regard to the boundaries mentioned in the petition, community of interest, physical features, existing boundaries of States, and such other matters as are deemed relevant, what should be the limits of the new State, if established.

The new State shall not be established unless in a convention, the members of which shall be chosen by the electors in the territory of the new State as defined at the time of election, a majority of the members approve the limits of the new State and a constitution therefor, and unless the question whether the new State should be established is submitted to the electors in the territory of the new State as defined at the time when the question is submitted, and in the State or States affected, and—

(i) unless in the territory of the new State, or where the territory includes parts of two or more States, then in each part a majority of the electors voting approve the proposed establishment, and unless in the State or in each State affected a majority of the electors voting approve the proposed establishment, of the new State; or

(ii) unless in the territory of the new State, or where the territory includes parts of two or more States, then in each part three-fifths at least of the electors voting approve the proposed establishment, and unless in the State or each State affected two-fifths at least of the electors voting approve the proposed establishment, of the new State.

The question whether the new State should be established shall not be submitted to the electors until after an inquiry is made into the circumstances of the new State, the value of the assets to be transferred thereto from any State, and such other matters as the Parliament deems proper in order that the electors may have the requisite information before voting on the question, and until after the report of the inquiry is published.

The new State shall not be established unless the establishment thereof is proclaimed within two years after the vote is taken.

Subject to the provisions of this section the Parliament may make laws—

(i) prescribing the manner in which a petition for the establishment of a new State may be presented, and the information which shall be given in or with the petition;

(ii) defining the limits of the new State;

(iii) prescribing the terms and conditions on which the new State may be established;

(iv) providing for a convention which shall be charged with the duty of framing a constitution for the new State, and shall be authorized to suggest to the Parliament any variation of the limits of the new State and any variation of the terms and conditions on which the new State may be established;

(v) prescribing the manner in which the question whether the new State should be established shall be submitted to the electors and the manner in which the vote shall be taken;

(vi) establishing the new State if the establishment is approved as required by this section.

The provisions of this section referring to the electors refer to electors qualified to vote for the election of the House of Representatives.

Sir Hal Colebatch and the Chairman.—Sir Hal Colebatch and the Chairman do not concur in the part of this recommendtaion which provides for the Commonwealth Parliament having power to establish a new State notwithstanding that a majority of the votes cast in the existing State is against the proposal.

Mr. Duffy and Mr. McNamara.—Mr. Duffy and Mr. McNamara are of opinion that the Constitution should not prescribe any minimum area for a new State.

TAXATION.

The existing power. Excise.

We do not think that the power of the Commonwealth Parliament with respect to taxation should be in any way curtailed, nor do we think that the constitutional restrictions which are alluded to in the evidence of Mr. Ewing, and which were passed for the purpose of safeguarding the position of the Senate, should be removed. We think, however, that the position of the States has been prejudiced by the interpretation which has been placed upon the term "excise". There does not appear to be any sufficient reason why the Commonwealth should have exclusive power over all indirect taxation imposed immediately upon or in respect of goods, as the Commonwealth is said to have in one of the judgments in the *Petrol* case (*see* section xii. of this report), nor is it desirable that there should be any doubt as to the right of a State to impose indirect taxation which does not interfere with the customs policy of the Commonwealth. We, therefore, suggest that

excise should be taken to apply only to those goods which are for the time being the subject of customs duties, as was suggested in the 1891 draft of the Constitution (*see* Chapter IV., clause 4). We recommend that section 90 of the Constitution should be amended so that the power of the Commonwealth Parliament to impose duties of excise should only be exclusive in respect of such goods.

Effect could, we think, be given to this recommendation by inserting at the end of section 90 the following paragraph:—

> "Notwithstanding any other provision of this Constitution the power of the Parliament to impose duties of excise shall not be exclusive in respect of goods which are not for the time being the subject of customs duties."

Residents of another State.

Although under section 117 of the Constitution a State may not tax a resident of another State at a higher rate than it taxes its own residents, it is not prevented from discriminating on the ground of domicile (*see Davies and Jones v. Western Australia*, 2 C.L.R. 29; and section xii of this report), and in some instances a State does in fact discriminate on this ground. Under the New South Wales *Stamp Duties Act* 1920, as amended by subsequent Acts, death duty in respect of the estate of a deceased person is payable although the final balance of the estate does not exceed £1,000, if the person was domiciled without, but not if he was domiciled within, New South Wales, (*see* s. 101 and the third schedule of the Act). In our opinion, it is not within the spirit of section 117 of the Constitution that a State should be permitted to discriminate in taxation on the ground of domicile in any other part of the Commonwealth. We recommend that section 117 should be amended so as to prevent such discrimination.

Effect could, we think, be given to this recommendation by adding at the end of section 117 of the Constitution the following paragraph:—

> "For the purpose of any law of a State imposing taxation a person resident or domiciled in any part of the Commonwealth shall not be subject to any discrimination which would not be equally applicable to him if he were resident or domiciled in that State."

Double Taxation.

We think that the Commonwealth Parliament should have power to deal with taxation by two or more States in respect of the same asset or other subject of taxation. Amendments with the object of preventing such double taxation were suggested by a conference of State taxation officials held in 1924, and by Mr. Fitzpatrick, Commissioner of Stamp Duties, Queensland (evidence, pp. 1561-1562). Neither of these suggestions appears to us to be entirely satisfactory. We recommend that power should be conferred on the Commonwealth Parliament to make laws with respect to the matter.

Effect could, we think, be given to this recommendation by inserting in section 51 of the Constitution the following paragraph:—

> "(ii*a*) Taxation by two or more States of the same person or property so as to regulate or prevent double taxation."

Trade and Commerce with other Countries and among the States.

We do not recommend that an unlimited power to make laws with respect to trade and commerce should be conferred on the Commonwealth Parliament.

The terms "trade and commerce" have a very wide connotation, and if the power to legislate with respect to trade and commerce were transferred to the Commonwealth Parliament, we think that it would be difficult to say what powers were left to a State, or what Acts of a State Parliament might not be overridden by Federal laws. We do not think that the same reasons against limiting the Federal power to trade and commerce with other countries and among the States exist in Australia as might be urged with regard to the Constitution of the United States of America. In Australia, where the States are relatively few and large, where the population is concentrated in a few cities and each capital is on or adjacent to the coast, it is much easier for the States to control commercial activities and to deal with any abuses that may arise than it would be if the States were small and approximately equal in size. In our opinion a wise course was followed in the 1891 draft and in the Constitution itself when, instead of a complete power to legislate with respect to trade and commerce being conferred, certain elements of that power were mentioned separately, and such powers were conferred on the Commonwealth Parliament as it was thought could conveniently be exercised by a central legislature.

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the views of Mr. Ashworth, Mr. Duffy and Mr. McNamara see section xxii., pp. 243-247.

Trade and Commerce between States and Territories.

Section 51 (i) of the Constitution does not appear to confer power on the Commonwealth Parliament to regulate trade and commerce between States and Territories. The Parliament may, under section 122, allow a State to trade freely with a Territory, but it has, it seeems, no power to direct that a Territory may trade freely with a State notwithstanding any law of the State to the contrary.

We recommend that power be conferred on the Commonwealth Parliament to enable it to make laws with respect to trade and commerce between States and Territories.

Effect could, we think, be given to this recommendation by inserting at the end of paragraph (i) of section 51 of the Constitution the following words:—

> "and between any Territory or Territories and any State or States."

Marketing.

We do not recommend that power to legislate with respect to marketing be conferred on the Commonwealth Parliament.

An alteration of the Constitution with the object of conferring this power was urged by several witnesses. The advantages claimed for the amendment by several, but not by all, of the witnesses who urged it,

have, we think, been secured by recent Commonwealth legislation in the exercise of the power conferred by section 51 (i). An unlimited power to legislate with respect to marketing would, we think, involve an unnecessary and dangerous interference with the internal government of the States, and might be so interpreted as to enable the Commonwealth Parliament to control the disposal of all products and the use of all lands or factories employed in production.

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the views of Mr. Ashworth, Mr. Duffy and Mr. McNamara see section xxii., pp.243-247.

Wireless Transmission and Broadcasting.

The Commonwealth Parliament may legislate with respect to wireless telegraphy under the power conferred by section 51 (v) of the Constitution to make laws with respect to postal, telegraphic, telephonic and other like services. It is possible that all wireless transmission and broadcasting would be included in the phrase "other like services", but as to broadcasting this interpretation has been doubted. It may also be suggested that the Parliament may legislate with respect to wireless transmission and broadcasting under the trade and commerce power conferred by section 51 (i).

In our opinion full power to make laws with respect to wireless transmission and broadcasting should be conferred on the Commonwealth Parliament in express terms.

Effect could, we think, be given to this recommendation by inserting in section 51 of the Constitution the following paragraph:—

"(v*a*) Wireless transmission, including broadcasting and other like services".

Cinematograph Films.

We recommend that the Commonwealth Parliament should have power to legislate with respect to films and the censorship of films. The Commonwealth exercises a censorship over imported films, and claims that it is entitled, in the exercise of its powers under section 51 (i), to direct the manner in which an imported film shall be used after it has left the hands of the original importer. The Commonwealth has no power to control films made in Australia. We think that the authority which controls imported films should control all films within Australia, and that this authority should be the Commonwealth.

Effect could, we think, be given to this recommendation, by inserting in section 51 of the Constitution the following paragraph:—

"(xviii*a*) Cinematograph films."

Freedom of Trade, Commerce and Intercourse among the States.

We recommend that section 92 be amended for the sake of greater clearness. An amendment was suggested by Mr. Owen Dixon, K.C., now Mr. Justice Dixon, in the evidence given by him on behalf of the Committee of Counsel of Victoria. Since this evidence was given a great diversity of judicial opinion on the interpretation of this section has been further illustrated by the decisions of the High Court in the

cases of *Roughley* v. *New South Wales* and *Nelson* v. *Couch* (35 *Argus* L.R. 1, 21). The difficulties of interpretation disclosed in previous decisions are enumerated by Mr. Owen Dixon at pp. 777–778 of the evidence:—

"The difficulties in understanding what this provision really means are threefold:—

(1) In terms it does not refer to State or Federal Parliaments, nor indeed to legislation at all. If, however, it intends to include the Commonwealth in its prohibition, there appears to be an opposition between a provision which says that trade and commerce among the States shall be absolutely free and the provision of section 51 (i) which says that the Federal Parliament may make laws with respect to trade and commerce among the States. If "free" means free of all legal restriction, and the provision applies, as its terms seem to make it, to the Commonwealth, it would follow that the Federal Parliament's power to make laws in relation to interstate trade did not include the enactment of any restrictive law at all. This has led to the argument that either the word "free" must mean free of something less than all legal restriction, or else the provision cannot apply to the Commonwealth. The High Court has now adopted the latter of these alternatives.

(2) It seems incredible that the immunity given by section 92 should operate to prevent the States from including, in general prohibitions relating to transactions of trade and commerce, transactions which form part of interstate trade. The suppression of lotteries, for instance, in a State, upon a logical application of the view that freedom means freedom from all legal restriction, could not extend to a lottery conducted by interstate communications.

(3) There is no reference to Federal territories in section 92. So far as its provisions are concerned, there appears nothing to prevent either State Parliaments or the Parliament of the Commonwealth interfering to the extent of fully prohibiting trade, commerce and intercourse between the Northern Territory and the rest of Australia."

To the instances there given we may add that it seems incredible that the States were to be prevented from passing a price-fixing law applicable to goods which are, as well as to goods which are not, the subject of an interstate contract (*McArthur's* case, 28 C.L.R., 530), or that the States were not to be prevented from impeding trade and commerce between the States by an executive act.

Alternative amendments suggest themselves. One is an amendment limiting the freedom prescribed by the section to freedom from pecuniary imposts. This amendment would enable the States to pass laws regulating an influx of criminals or the introduction of diseased animals or plants, subject to the overriding power of the Commonwealth Parliament. In view of the existence of this overriding

power, which may not have been present to the minds of the members of the Convention, and was at one time denied by the High Court, it seems that an amendment so limiting the terms of the section would effect all the objects for which the section was framed.

An alternative is the amendment suggested by Mr. Owen Dixon in the following terms:—"The States shall not by any discriminatory law or executive act impair the freedom of trade, commerce and intercourse among the States and the Territories of the Commonwealth." It seems doubtful whether, if the section were so amended, the States would have power to pass laws regulating the passage of diseased animals or plants over their borders.

Another alternative is to substitute a new section on the lines of clause 4 of chapter IV. of the 1891 draft of the Constitution. That clause was as follows:—

> "The Parliament of the Commonwealth may make laws prohibiting or annulling any law or regulation made by any State, or by any authority constituted by any State, having the effect of derogating from freedom of trade or commerce between the different parts of the Commonwealth."

We recommend that section 92 of the Constitution be amended so as to make it plain that the section is intended to prevent a State from restricting trade commerce or intercourse by pecuniary imposts, and not to prevent it from protecting itself against the introduction of diseased animals or plants. We think that any amendment should extend the section so as to apply it to the Territories. We also think that the Commonwealth Parliament should be empowered to prohibit, modify or annul any State enactment which derogates from freedom of trade commerce or intercourse between the different parts of the Commonwealth.

Effect can, we think, be given to these recommendations (*a*) by inserting after the words "trade, commerce and intercourse among the States" in section 92 of the Constitution the following words:—"or between a State and a Territory"; (*b*) by adding after the words "shall be absolutely free" the following words:—"from any pecuniary impost or from any restriction or liability imposed by reason only of goods or persons passing into a State from another State or from a Territory"; and (*c*) by inserting after the first paragraph of section 92, as amended, the following paragraph:—

> "The Parliament of the Commonwealth may make laws prohibiting, modifying or annulling any law or regulation made by any State, or by any authority constituted by any State, having the effect of derogating from freedom of trade, commerce or intercourse among the States or between any Territory or Territories and any State or States.

Section 96.—Financial Assistance to States.

Section 96, which empowers the Commonwealth Parliament to grant financial assistance to any State, begins with the words "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides". We think that these words are ineffective and may lead to confusion. We recommend that they be deleted from the section.

Section 99.—Preference to States.

We recommend that to section 99, which provides that the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to any State or any part thereof over another State or any part thereof, the words be added "except upon the recommendation of the Inter-State Commission" (see evidence of Professor Brigden, at pp. 844-845).

Section 99 appears to have been introduced into the Constitution for the purpose of protecting the States which have a relatively small population. As events have happened, however, it may be suggested that it would be for the advantage of the smaller States if the Commonwealth had power to enact special legislation relieving them from the consequences of Commonwealth policy. We have dealt elsewhere with the proposal to reinstate the Inter-State Commission, and we think if that, or some similar body, were directed to inquire into the effects of Federal policy, it would be wise to give the Commonwealth Parliament power to act on its recommendations, if it were to find that one or more States were adversely affected by legislation which was deemed by Parliament to be in the interests of Australia as a whole. The section as it stands does not forbid legislation which is in fact beneficial to one or more States rather than to the whole of Australia. It forbids only preferences in relation to localities considered as parts of States. We are of opinion that the section as it stands does not effect any useful or necessary purpose, and may prevent the passage of legislation which is desirable and which might eliminate much of the feeling against the Federation which was expressed before this Commission in some of the States.

Registration of Doctors, Dentists, Pharmacists and Nurses.

Recommendations are made in section xxiv. of this report by one or more members of the Commission as to the nature and scope of the power that should be conferred on the Commonwealth Parliament in regard to health generally. The recommendations made in this part of the report as to the registration of doctors, dentists, pharmacists and nurses, and under the next heading as to drugs and standards of foods, are submitted independently of those recommendations.

We recommend that the Commonwealth Parliament be empowered to legislate with respect to the registration of physicians, surgeons, dentists, pharmacists and medical and surgical nurses. Apart from the convenience of one registration being recognized throughout the Commonwealth, so that duly qualified persons who had been in practice in one State might, without any unnecessary delay, carry on their callings in another State, whether temporarily, as is sometimes convenient for a doctor acting as *locum tenens*, or in an emergency or permanently, we think that there is great force in the view expressed by Dr. Storie Dixson, President of the New South Wales Medical Board, that "all these people are dealing with human well-being and life, and therefore . . . . there should be a law securing a high and uniform standard in all these different branches" (evidence, p. 1642).

Effect could, we think, be given to this recommendation by inserting in section 51 of the Constitution the following paragraph:—

(ix*a*). Registration of physicians, surgeons, dentists, pharmacists and medical and surgical nurses.

Drugs and Standards of Foods.

Similar Acts with respect to the purity of foods and drugs have been passed in all the States, and reference has already been made, in section xvii. of this report, to the steps which have been taken from time to time with a view to a uniform standard for the Commonwealth, but there are still some differences.

We recommend that the Commonwealth Parliament be empowered to legislate with respect to drugs and standards of foods.

Effect could, we think, be given to this recommendation by inserting in section 51 of the Constitution the following paragraph:—

(ix*b*). Drugs and standards of foods.

Sir Hal Colebatch.—For the views of Sir Hal Colebatch, see section xxiv., p. 299.

Adoption and Legitimation.

Although adoption of children as a legal institution whereby a family relationship is created with defined consequences has a long history in other countries, it is a new institution in England and Australia. In the state of the law which was in force at the establishment of the Commonwealth, the question of conferring a power on the Commonwealth Parliament to make laws with respect to adoption may not have appeared to be of sufficient importance to require the making of any provision in the Constitution for that purpose. A system of adoption is now in existence in three of the States of the Commonwealth, New South Wales, Victoria, and Western Australia, as well as in New Zealand and England. It was suggested by Miss Cocks, representing the Laws Committee of the National Council of Women of New South Wales (evidence, p. 1183) that the Commonwealth Parliament should be empowered to legislate with respect to adoption.

What has been said above as to adoption being a new institution in Australia, but having a long history in other countries, applies also to legitimation of children, where the parents have subsequently become husband and wife. Provision for legitimating children in such circumstances by registration at the instance of the father has been made in New South Wales by the *Legitimation Act* 1902.

We think that reasons similar to those which make it desirable that there should be an Australian law of marriage are strong arguments in favour of the Commonwealth Parliament having power to legislate with respect to adoption and legitimation, and we recommend that this power be conferred on the Commonwealth Parliament.

Effect could, we think, be given to this recommendation by inserting at the end of paragraph xxi. of section 51 of the Constitution, which deals with marriage, the words "adoption and legitimation".

Probate and Letters of Administration.

The position of an executor or administrator, where the assets of a deceased person are situated in two or more States, is shortly stated at page 136 of this report.

We recommend that the Commonwealth Parliament be empowered to legislate with respect to the operation of probate or letters of administration throughout the Commonwealth.

Effect could, we think, be given to this recommendation by inserting in section 51 of the Constitution the following paragraph:—

(xxii*a*). The operation throughout the Commonwealth of probate or letters of administration granted in any State or Territory or in the United Kingdom or in any British possession.

Election of Senators.

At present, as already mentioned in section v. of this report, although parties may be almost equally divided in the constituencies, one party may so far predominate in the Senate that there may be no opportunity for the presentation of different points of view. We think that such a condition of affairs is undesirable, and that the Senate would be better qualified to act as a chamber of revision if senators were elected under a system of proportional representation. We recommend that the Constitution should be amended so as to provide for the adoption of such a system for a period of at least ten years.

Effect could, we think, be given to this recommendation by inserting at the end of section 7 of the Constitution the following paragraph:—

During a period of ten years after the day of and thereafter until the Parliament otherwise provides, the election of Senators shall be according to the principle of proportional representation.

Mr. Ashworth.—For the views of Mr. Ashworth, see section xxiv., pp. 277-293.

Sir Hal Colebatch.—For the views of Sir Hal Colebatch, see section xxiv., p. 300.

Defence.

Despite the wide scope of the defence power it appears from the judgment of the High Court in *Commonwealth* v. *Australian Commonwealth Shipping Board* (39 C.L.R. 1) that the Commonwealth Parliament could not confer authority on the Shipping Board to enter, in time of peace, into such a contract as "the Bunnerong Contract" for doing work at the Cockatoo Island Dockyard for other than Commonwealth authorities (see section xi. of this report). Whatever view may be taken as to the policy of carrying out work for civilian purposes in regard to any matter for which private enterprise provides adequate facilities, we think that the limitation of the defence power referred to above should be removed, and that the Commonwealth Parliament should be empowered to authorize the carrying out of work for civilian purposes where such a course is deemed necessary in order to put Australia in a state of preparation for war or war emergencies. We, therefore, recommend that paragraph (vi) of section 51 of the Constitution, which deals with defence, should be amended so as to include business operations carried on as part of the preparation for defence.

For clearness we also recommend that the paragraph mentioned above be amended by omitting the words "naval and military". We do not think that it is desirable to specify particular aspects of defence either by inserting words expressly referring to air defence, or by retaining words expressly referring to "naval and military" defence.

Effect could, we think, be given to these recommendations by deleting from paragraph (vi) of section 51 of the Constitution the words "naval and military" and by inserting in that paragraph after the words "defence of the Commonwealth and the several States", the following words:—"any preparation deemed necessary for such defence".

Resignations of Members of Parliament.

For clearness we recommend that sections 19 and 37 of the Constitution be amended so as to make it plain that the resignation of a member of Parliament takes effect from the receipt of the writing addressed to the President, to the Speaker, or to the Governor-General, as the case may be.

Effect could, we think, be given to this recommendation by omitting the word "thereupon" in sections 19 and 37 and adding at the end of each section the words "upon the receipt of the writing".

Life of Parliament.

We recommend that the life of Parliament should be increased to at least four years. This recommendation is intended to apply to the term for which members of the House of Representatives are elected, and not to affect the term for which members of the Senate are elected.

In our opinion, the period of three years is inadequate for the Parliament of the Commonwealth in view of the great size of Australia, the large area of some of the constituencies, the distance of some of them from the Seat of Government, the number and importance of the problems with which each Parliament has to deal, the fact that a portion only of the term for which members are elected can be devoted to the transaction of the business of Parliament, the extent to which that term is in effect curtailed by the time taken up in settling down after an election and in the preparation for a new election, and the necessity of the Prime Minister attending an Imperial Conference.

We, therefore, recommend that section 28 of the Constitution be amended by omitting the word "three" and inserting in its place the word "four".

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the views of Mr. Ashworth, Mr. Duffy and Mr. McNamara, see section xxiv., p. 304.

Surrender of an Area of a Territory by the Commonwealth to a State.

Section 111 of the Constitution empowers the Parliament of a State to surrender any part of the State to the Commonwealth, but does not empower the Parliament of the Commonwealth to surrender any part of a Territory to a State. It may at times be desirable for the Commonwealth to have power to surrender an area of a Territory to a State in an adjustment of boundaries or for convenience of administration. There is, for instance, a portion of the Federal Territory

which the Federal Capital Commission has no desire to acquire, and which could be conveniently administered as part of the Municipality of Queanbeyan, if that portion were re-transferred to the State of New South Wales (evidence, p. 142). We recommend that a power to surrender any area of a Territory to a State be conferred on the Commonwealth Parliament.

Effect could, we think, be given to this recommendation by inserting at the end of section 111 the following paragraph:—

> The Parliament of the Commonwealth may surrender to a State any part of a Territory for the government of which the Parliament may make laws, and such surrender shall take effect upon the acceptance thereof by the State.

Office of Profit under the Crown.

We do not recommend that section 44 of the Constitution should be amended so that a civil servant may be capable of being chosen or of sitting as a senator or a member of the House of Representatives.

Mr. Duffy and Mr. McNamara.—For the views of Mr. Duffy and Mr. McNamara, see section xxiv., p. 303.

Constitutional Convention.

We do not recommend that provision be made in the Constitution for the holding of a convention to consider and frame proposals for the alteration of the Constitution, whether the proposals are to be submitted as recommendations to Parliament or direct to the electors.

Mr. Ashworth.—If the method of altering the Constitution recommended by Mr. Ashworth, Mr. Duffy and Mr. McNamara in section xxii. (pp. 243-247) is not adopted, Mr. Ashworth thinks that provision should be made in the Constitution for the holding of a convention to consider and frame proposals for the alteration of the Constitution, and that the proposals should be submitted direct to the electors.

Railways.

We do not recommend that the control of railways be transferred to the Commonwealth. We think that railway administration is closely bound up with internal development, and that this is a function of the States. We also think that the problem of communication should be considered as a whole, and that the authority which controls roads and harbours should also control railways. Further, we think that the planning and building of railways is a subject which requires local knowledge and is not a subject which could be satisfactorily controlled by a central authority.

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the views of Mr. Ashworth, Mr. Duffy and Mr. McNamara see section xxii., pp. 243-247.

Aborigines.

We do not recommend that section 51 (xxvi) be amended so as to empower the Commonwealth Parliament to make laws with respect to aborigines. We recognise that the effect of the treatment of aborigines on the reputation of Australia furnishes a powerful argument for a transference of control to the Commonwealth. But we think that on the whole the States are better equipped for controlling aborigines than the Commonwealth. The States control the police and the lands, and they to a large extent control the conditions of industry. We think that a Commonwealth authority would be at a disadvantage in dealing with the aborigines, and that the States are better qualified to do so. At the same time we think that every endeavour should be made to ensure the adoption of the best methods of administration by periodical conferences, and that every encouragement should be given to those voluntary bodies which in many of the States have worked for the improvement of the condition of aborigines.

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the views of Mr. Ashworth, Mr. Duffy and Mr. McNamara see section xxiv., p. 303.

Fauna and Flora.

We do not recommend that the Commonwealth Parliament be granted power to legislate with respect to fauna or flora. We think that the States, through their control of the police, of education and of local government, are better qualified to judge of the best means of safeguarding fauna and flora than the central authority could be. At the same time we think that the difficulties experienced by the States furnish a strong argument for the amendment of section 92 as we have recommended elsewhere.

On the whole, as far as the evidence enabled us to judge, we are of opinion that the States are carrying out their duties efficiently, but we express the opinion that there should be more effective co-operation between the Customs authorities and the authorities of the States, and that a strong case might be made out for the biological survey recommended by Dr. Brooke Nicholls with the object of preventing valuable species of Australian fauna from becoming extinct.

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the views of Mr. Ashworth, Mr. Duffy and Mr. McNamara see section xxiv., p. 303.

Liquor Laws.

We do not recommend that the Commonwealth Parliament should have power to make laws with respect to the sale of liquor or with respect to prohibition, as was urged by Mr. Crawford Vaughan. This power should, we think, be in the hands of the authority which has control of the police, and the experience of the United States of America appears to us to confirm this view. Further, we are of opinion that there is so much diversity between the conditions of the different States that each State should be at liberty to decide for itself on this question. Section 113 of the Constitution enables each State to control or prohibit the use, consumption, sale, or storage of liquor within its own borders, whatever view may be taken as to its power to prevent the importation of liquor from another State or from overseas (*see* the evidence of Sir Robert Garran, page 82).

XXIV.—SUPPLEMENT AND RECOMMENDATIONS BY ONE OR MORE MEMBERS OF THE COMMISSION.

Supplement by Colonel Abbott.

I desire to supplement what has been said in the recommendation of the majority in favour of retaining a Federal system of government for Australia, and to state my views as to the provision of increased facilities for the creation of new States or Provinces. Anything that would be calculated to destroy the Federal nature of the Constitution would, in my opinion, necessitate the reconstruction of the whole scheme of relations as between the Commonwealth and the States. The present Constitution can be preserved in its fundamental usefulness, with such amendments as experience has shown or may show to be desirable, and at the same time satisfactory provision can be made for increasing the number of States from time to time, with adequate safeguards for their right to legislate on all matters of local or State concern.

Any proposal that would bring about unification, or the complete vesting of all legislative power in one Commonwealth Parliament, leaving the States or Provinces only powers of local regulation and administration, would not be approved by a majority of the people, but I believe that large numbers of people, particularly in such areas as Northern New South Wales and Central Queensland, are prepared to vote in favour of the establishment of new States, provided that the terms and conditions on which they are to be established are arranged to the satisfaction of the people of the areas, and provided that their right to deal with their own affairs is properly safeguarded. It would be impossible to have adequate safeguards for this purpose under a scheme of unification. I believe that the people of the area in which it is proposed to establish a new State should have the fullest opportunity to initiate a proposal to obtain such a constitution as they think will be best suited to their needs, and to conduct direct negotiations with the Commonwealth for the establishment of a new State on terms and conditions satisfactory to the people of the area. If the people of the area and of the existing State are not in agreement, the question whether a new State is to be established should, in my opinion, be left to the decision of the Commonwealth Parliament. The adoption of such a principle, with provisions under which a proposal for the establishment of a new State may be properly investigated so that the essential facts shall be before the people both in the area and in the existing State when they are called upon to vote on the proposal, is the most practicable way at the present time of getting increased facilities for the creation of new States. I do not think that there is any necessity to provide in the Constitution that any prescribed period must elapse after an unsuccessful attempt has been made to bring about the establishment of a new State. If there is not a reasonable prospect of another attempt being successful, it is unlikely that it will be made. If there should be such a change in public opinion either in the area or in the existing State as would warrant reconsideration, I do not think that there is any sufficient reason for inserting in the Constitution any provision which would prevent such reconsideration.

An amendment of the Constitution which would permit a new State to be established in the way above suggested would get rid of the difficulty which now confronts those who believe in the creation of new

States in particular areas. In view of the last paragraph of section 128 it seems that before such an amendment can take effect in regard to any particular State, it must be approved by a majority of the voters in that State as well as by a majority of the voters in the Commonwealth and a majority of the voters in three other States. Once, however, the amendment is made in regard to any State, it will be a provision of the Constitution under which a new State can be established in that State, and accordingly the last paragraph of the Constitution will not in any way affect its establishment.

With proper facilities for the creation of new States or Provinces, the existing provisions for the amendment of the Constitution are adequate. It has been shown in the State debts and financial agreement referendums that when all parties in the Commonwealth and the States are in accord with a proposed alteration, the approval of the majority of voters and the necessary number of States is readily obtained.

P. P. ABBOTT.

Recommendations by Colonel Abbott, Mr. Bowden, and the Chairman.

Company Law.

We recommend that the Commonwealth Parliament should have power to make laws with respect to companies, the extent of the power to be defined in the manner set out below.

We are of opinion that uniformity in company law in Australia for the purpose both of safeguarding the public and of providing facilities for investment is desirable.

The power which, in our opinion, should be vested in the Commonwealth Parliament in regard to companies is a power to pass a company law for the whole of Australia in the sense in which the term "company law" is generally understood. We think, therefore, that an amendment of the Constitution for this purpose should be drafted in such a way as to make it clear that the intention is to confer a power to pass such a law, and not to confer a power to legislate with respect to the trade commerce or industry carried on by companies. The extent to which the Commonwealth Parliament is to control such trade commerce or industry should, in our opinion, depend on the extent to which the Parliament is authorised by other provisions of the Constitution to deal with these matters.

We think that the power should extend to all matters of "company law", including incorporation, winding up and dissolution, but should not extend to any municipal or governmental corporation, or any corporation formed solely for religious, charitable, scientific or artistic purposes, or any corporation not formed for the acquisition of gain by the corporation or its members.

We also think that the power to pass a company law should be qualified in such a way as to ensure that any legislation enacted by the Commonwealth Parliament under this power shall not preclude or affect any State legislation with respect to co-operative societies unless the Commonwealth Parliament expressly declares its intention to the contrary. This qualification is, in our opinion, desirable, as each State may need different legislation, and so long as a society incorporated under a State Act is genuinely co-operative, the Commonwealth Parliament should leave the matter to the States.

We do not think that the difficulties to which our attention was drawn by Mr. Owen Dixon, Mr. Layton, and other witnesses, and which are set out or referred to in section xx of this report, should be ignored, but we think that the difficulties may be overcome by conferring the power in the terms set out below, and by care in administration.

Under the following heading, "Partnerships," we make a recommendation on similar lines in regard to partnerships, which might be dealt with in a new paragraph (xx).

Effect could, we think, be given to our recommendation in regard to companies by omitting paragraph (xx) of section 51 of the Constitution, and inserting the following paragraph:—

(xx*a*) Corporations, but not including—

(*a*) municipal or governmental corporations, or any corporation formed solely for religious, charitable, scientific or artistic purposes, or any corporation not formed for the acquisition of gain by the corporation or its members; or

(*b*) any corporation formed for the acquisition of gain by the corporation or its members which is a co-operative society within the meaning of the law of a State, unless the Parliament of the Commonwealth expressly declares that any such corporation is not a co-operative society within the meaning of the law of the Commonwealth; or

(*c*) the trade commerce or industry of corporations except so far as the Parliament has power under any other provision of this Constitution to make laws with respect to such trade commerce or industry.

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the views of Mr. Ashworth, Mr. Duffy and Mr. McNamara see general recommendation in section xxii., pp. 243-247.

Sir Hal Colebatch.—For the views of Sir Hal Colebatch see section xxiv., pp. 298-299.

Partnerships.

In our opinion, it would be convenient and would prevent uncertainty in legislation, if the same Parliament which has power to legislate with respect to trading and financial companies, which in effect are partnerships incorporated and regulated by statute, should also have express power to legislate with respect to partnerships.

We recommend that the Commonwealth Parliament be empowered to legislate with respect to partnerships, but not with respect to the trade commerce and industry of partnerships except so far as it has that power under any other provision of the Constitution (see under the previous heading "Company Law").

Effect could, we think, be given to this recommendation by inserting the following paragraph in section 51:—

(xx) Partnerships, but not including the trade commerce or industry of partnerships except so far as the Parliament has power under any other provision of this Constitution to make laws with respect to such trade commerce or industry.

Mr. Ashworth, Mr. Duffy and Mr. McNamara.—For the views of Mr. Ashworth, Mr. Duffy and Mr. McNamara see general recommendation in section xxii., pp. 243-247.

Sir Hal Colebatch.—For the views of Sir Hal Colebatch see section xxiv., pp. 298-299.

Health.

We recommend that power to make laws with respect to co-operation between the Commonwealth and the States in regard to health be conferred on the Commonwealth Parliament.

We think that the exercise of power by the Commonwealth in regard to health must be dependent for success upon agreement between the Commonwealth and the States as to their relative spheres of legislation and administration, but it is not, in our opinion, immaterial whether the power is conferred without qualification, or whether it is conferred with some qualification indicating that the activities of the Commonwealth are to be in aid of the States and not exclusive.

The evidence placed before the Commission shows, in our opinion, both the value and the practicability of co-operation between the Commonwealth and the States in regard to health, and we believe that the advantages of the co-operation which has been already established can be best preserved and extended by giving the Commonwealth Parliament power to make agreements with any State and to make laws for giving effect to those agreements.

The Commonwealth Parliament at present legislates with respect to quarantine, and it has taken the view that under the quarantine power it may make provision for isolation, disinfection, and segregation. It has assumed power to deal with a number of problems relating to disease wherever it may occur, but it has no power, except by appropriation of money, to deal with the prevention of disease. It has assisted the States in safeguarding the health of the people by establishing clinics, by research, and in other ways, but its power to legislate in aid of these measures is doubtful.

In our opinion there is need and room for both Commonwealth and State effort. It seems probable that in some directions the proper fields for Commonwealth and State action have already been indicated by the experience gained through co-operation. It may, for instance, be suggested that the task of the Commonwealth should include such matters as conducting national inquiries, formulating basic principles, and promoting research into the causes and the means of prevention of disease, and that the task of the States should include the administration of public health measures through local government bodies as well as through officers and agencies of the State governments. We do not think, however, that an attempt should be made to specify in the Constitution the limits of the respective spheres of the Commonwealth and the States in regard to health, and in our opinion the extent of Commonwealth and State authority and responsibility should be defined by agreement from time to time after problems of health have been considered by such a body as the Federal Health Council.

Further, we think that a power to co-operate with the States in regard to health would carry with it a corresponding responsibility, with the result that the States should, as to some of the matters covered by an agreement with the Commonwealth, either receive financial assistance or be relieved of the duty of providing for public health.

We think that the power could be conferred by inserting in section 51 of the Constitution the following paragraph:—

(ix*a*.) Co-operation with any State in respect of health, and the giving effect to any agreement made between the Commonwealth and the State in relation thereto.

P. P. ABBOTT.
E. K. BOWDEN.
J. B. PEDEN.

Recommendation by Colonel Abbott, Sir Hal Colebatch and the Chairman.

State Instrumentalities.

Apart from the reasons given in the recommendation in section xxiii. of this report with respect to industrial matters, there are, we think, special reasons why each State should have control of matters relating to its own employees. We think that each State should be responsible for carrying on the government of the State, and for carrying on the trading and other enterprises and activities that it may see fit to undertake, and that Commonwealth control of the terms and conditions of State employment is incompatible with responsible government. Until the decision in the *Engineers'* case in 1920, the Constitution was interpreted as containing an implied prohibition against the exercise of Commonwealth powers in such a way as to fetter or control State instrumentalities, and this principle was regarded as essential to the satisfactory working of the Federal system.

We recommend that the Constitution be amended so as to provide expressly that Commonwealth powers are not to extend to the terms and conditions of State employment.

Effect could, we think, be given to this recommendation by inserting at the end of section 107 of the Constitution the following paragraph:—

> The Commonwealth shall not make any law with respect to the terms and conditions of employment of any persons by any State or by any authority constituted by a State.

Mr. Bowden.—If paragraph (xxxv) of section 51 of the Constitution is not deleted, as suggested in the recommendation of the majority in section xxiii. of this report, Mr. Bowden does not concur in this recommendation with respect to State instrumentalities.

P. P. ABBOTT.
HAL COLEBATCH.
J. B. PEDEN.

Supplement and Recommendations by Mr. Ashworth.

Part I.—Preliminary.

Concerning the majority recommendations embodied in the report of the Commission my criticism is fundamental. With the exception of the majority and minority statements contained in section xxii., there are no recommendations designed to cure the more deep-seated defects of the Constitution revealed by experience. Although parliamentary parties play a most important part in the working, although the electoral method—the machinery by means of which the electors perform their function—is of the same vital concern as the machinery of Parliament, although the evil of corruption of constituencies is known to students of political science as the besetting danger of democracies, there is not, in my opinion, sufficient recognition of the importance of these matters in the report. There is a considerable quantity of evidence to show that the Senate has not functioned as intended, either as a States house, or as a chamber of review; there is no recommendation for improvement in these respects. There is no recognition of the reaction of the Constitution, as a whole, upon the life and character of the people.

Believing these several matters to be vital to the proper government of the Australian people, I deem it my imperative duty to state my own conclusions and recommendations in regard to them. I agree with Mr. R. Windeyer, K.C., that "there may be seeds of ruin in the present constitutional system which ultimately may destroy democratic institutions, but which at present may be hard to discover". Mr. Windeyer added that "it is none the less our duty to try to discover them, and I have approached this subject from the point of view, not of trying to see how the best can be made of the present Constitution, but from the aspect of discovering whether there are, or are not, defects in the constitutional system of Australia that may ultimately lead to disaster".

I believe that the separate amendments of individual powers and sections recommended in the report will serve to excise minor disabilities or cure minor ailments; and that the amendments recommended by the minority in section xxii. would effect a general improvement throughout the whole area of government. I am nevertheless convinced that there will still be "seeds of ruin" in the Constitution and that pending certain further and drastic changes some of the worst political and economic ills from which the people of Australia are now suffering will remain.

Part II.—Complexities of the Australian Constitution.

It is generally and loosely understood that the Australian Constitution is one of the most democratic extant, and that consequently it must yield better results than the Constitutions of less advanced countries. That representative democracy is the most complex and difficult of any of the forms of government; that the complexities are much greater in a federal than in a unitary system; that our Constitution is a combination of two incompatible systems of government—the British and the American; in a word, that the Australian Constitution in its accumulation of these complexities and difficulties presents an exceptionally difficult problem of government to the Australian

people is not yet generally or sufficiently recognized. Our Constitution is what is known as a federalism, and as such is modelled on that of the United States of America. Upon this model we have superimposed that mass of conventions known to students of political science as the British Cabinet system. This system postulates as its major thesis the responsibility of the executive to the legislature. Australia is the first and only country that has attempted to cross the British and American Constitutions. It may be objected that I overlook Canada. That country is but superficially a federalism. The English publicist and constitutional historian, Sir John Marriott, speaks of the "distinctly unitarian bias of the Canadian Constitution" (The Mechanism of the Modern State, vol. II., p. 415). In contrast to the Australian scheme, the Dominion Government may disallow measures passed by a provincial legislature; residual powers are vested in the Dominion; there are Dominion Law Courts only. In the legislative and judicial functions of government the Dominion is paramount.

The Australian Constitution is the first of its kind; it has no precedent; it is an experiment. Both the system of Cabinet Government and the Federalism with its inevitable adjunct legal system are complex and delicately adjusted mechanisms, and the contact one with the other may well be out of alignment. The Constitution is an attempt to combine the parts of two machines of government, differing in essential features, into one machine. In the concrete and therefore less difficult sphere of physical machinery, such an attempt would not be made. It were just as reasonable to amass the gears of an American roadster with the engine of a light British motor car and look for a uniform and serviceable article in the result.

Part III.—Cabinet, Presidential and Referendal Constitutions.

In different ways the American Presidential and British Cabinet systems of government are designed to ensure that political power shall be associated with responsibility. The separation of the legislative and executive functions of government in the Presidential plan enables this to be done by placing executive power in the hands of the President. In some of the States the device known as the recall has been adopted to enhance the responsibility of legislators as well as of the executive. The separation of powers also enables the initiative and referendum to be used. These devices vest power and responsibility in the people instead of in Parliament. As might be expected from its genesis, the Presidential system with its splitting up of power and responsibility is suitable to a federal system in which sovereign powers are divided between central and local bodies.

The legislative and executive functions of Government are linked together in the British system. Instead therefore of dealing with the various divisions of government in their detachment, as in the American plan, the British system demands that they be taken together and operated and judged as a whole. All the powers and all the responsibility are concentrated in and upon one body—the Cabinet. This result can be obtained in a unitary state but not in a federation.

Like most hybrids, the Australian Constitution is lacking in the distinctive merits of each of its progenitors. Sovereign powers being divided between Commonwealth and States, the central Parliament

cannot be held responsible as in Britain for government as a whole. The legislative and executive functions being linked together, those entrusted with their operation cannot be held responsible in separated parts by the people as they are in the United States. The initiative referendum and recall, being the very antithesis of the Cabinet system, cannot be employed.

Obviously, the ills which the Australian people are now suffering through the attempt to join two incompatible systems of government together can be removed by the adoption of either in complete form. If the recommendations of the minority contained in section xxii are accepted, the Cabinet system will serve the purpose. The alternative is the Presidential system together with the initiative, referendum and recall.

The Presidential form commends itself chiefly because of its comparative simplicity. In this respect the Constitution of the United States enjoys a decided advantage over that of Britain. An American citizen can focus the executive in an individual—the President; the Englishman must examine a group of persons—the Cabinet. But it must be remembered that the admitted intricacies of the Cabinet principle are alleviated in Britain by association with a unitary system, whereas the Presidential plan of the United States is linked up with the complexities of a federalism.

One witness gave evidence in favour of the referendal system. The distinguishing features of this system as embodied in the Swiss Constitution are:—

(1) The principle of popular initiation and popular referendum in relation to proposed legislation.
This takes the place of the legal sovereignty of Parliament in the British system.

(2) The principle of the elective ministry in place of the British party ministry.

(3) In the electorate, the principle of proportional representation of minor groups.

The Swiss Constitution has been true to promise. I find the explanation for its success in (*a*) the sympathetic relationship that binds these features into a common whole; (*b*) the simplicity and directness of the individual mechanisms; (*c*) the isolation of communities through natural barriers; (*d*) the small areas of the local units; (*e*) the tradition of direct government. Constitutions, however, which are suitable for one people or stage of culture may easily rank as failures for other peoples or different grades of civilization. Geographical conditions also must be taken into account. There can be little doubt that, if designed to meet the emergencies of a continent nation such as Australia, equipped as it is with a more complex social and industrial life than that of Switzerland, a referendal constitution would not reproduce the success achieved in the land of its origin. In its entirety therefore the Swiss Constitution would be an ill advised importation into Australia. The initiative and referendum can, however, be utilised to strengthen the Presidential system in the legislative function without in any way disturbing the equilibrium between the executive and the legislature.

If the Australian people desire to retain a Federal constitution, I report my considered belief that the Presidential system affords the only hope of success. But as between a Presidential federal system and a Cabinet unitary system I favour the latter. Therefore I urge the adoption of the proposals set forth in the recommendations of the minority contained in section xxii.

While there is good reason to believe that the concentration of all sovereign powers in the central Parliament would be a big step in the direction of better government, much more is required. The Cabinet system is not working as well as formerly in Britain. Sir John Marriott, who has been already quoted, attributes the decline to the appearance of two third parties in succession during the past forty years. He states that Sir Courtney Ilbert, "a particularly close observer of our Parliamentary Constitution, has declared that the Cabinet system presupposes not only a party system but a two-party system". A similar conclusion has been arrived at by a number of other competent observers. A. Lawrence Lowell declares:—

> "If the existence of a responsible ministry normally involves government by party, it also requires as a condition of success that there shall be only two parties" (*The Government of England,* Vol. I., p. 458). The following is taken from Lord Bryce's *American Commonwealth,* Vol. I., pp. 286, 287:—"It (the Cabinet system) is a system whose successful working presupposes the existence of two great parties and no more."

Many other authorities could be quoted to the same effect including Bagehot in his standard work *The British Constitution,* Bodley in his work *France,* and Professor Paul Reinsch in *World Politics.* In the light of the conclusions of these eminent authorities, the fact that we have three Parliamentary parties in Australia should be viewed with grave concern.

I believe that the Cabinet system is the highest form of government and that it affords the best hope for the future of democracy in a progressive modern state.. At the same time I agree with the declaration of Sir John Marriott that the Cabinet system "is of all forms of constitution the most delicate in its adjustments and therefore the most easily thrown out of gear. Depending for the most part upon conventions; perpetually adapting itself to new conditions, social and political; subject to continuous modifications in detail, it demands from those responsible for its working unceasing vigilance, a clear apprehension alike of practical conditions and of philosophical implications; above all it demands a reverence, almost religious in character, for the inner spirit which has inspired and still inspires it" (*The Mechanism of the Modern State,* Vol. II., p. 444).

Marriott's list of difficulties is far from being exhaustive. The Cabinet system has been tried by many States in which conditions other than those mentioned by him and essential to successful operation have been wanting. Most countries of Continental Europe are divided into racial, religious, and class groups to an extent that precludes the creation of the two necessary constitutional parties. But in Australia we are all of one race; the bitterness which exists between Catholics and Liberals does not exist; and while it is true that class differences have been promoted by the class line of division between political

parties, the general social and economic conditions of Australia make for social unity. The question remains: have the people of Australia the mental outlook stressed by Sir John Marriott? In my opinion they have not at the present time; but I believe that outlook can be generated by means of an electoral mechanism so designed as to be in complete adjustment with the parliamentary mechanism of the Cabinet system.

Part IV.—Sectionalism. The Corruption of Constituencies.

A multiplicity of parties results in instability, lack of continuity of policy, and corruption in government. Similar evils will accrue when party division is not based upon fundamental principles entailing differences as to what is good policy for the community as a whole. The divisions should not arise from religion, class or race. We must avoid undue sectionalism. We should not tolerate the organizing of groups for the purpose of exchanging votes for concessions. Such organizations spring from the tariff in its present form, the Arbitration Courts, the Navigation Act, the sugar embargo, and the concession of bounties to certain favoured industries. Government grants, institutions and policies which serve to raise costs to producers or prices to consumers are not only uneconomical—they are demoralizing and injurious politically. They sap the spirit of self-help and independence in the community; they undermine the foundations of parliamentary government. Nor is the cancer of undue sectionalism confined to industrial groups. Public servants and returned soldiers are found organized for the lucrative pursuit of their own advantage. Whole States are eager suppliants for special subsidies from the Commonwealth Exchequer. Such groupings open the flood gates of corruption; they facilitate the purchase of votes by a party of easy virtue. That the above statements are based upon fact is borne out by the following utterance of an ex-State Minister of Victoria (Mr. R. G. Menzies, K.C., M.L.C.), who was reported to the following effect on the 18th of July last in the Melbourne press:—"Most governments in Australia had got into the habit of pouring out money that did not belong to them. The people's money was eagerly put into the pockets of any sectional interest which had a political pull. Every time an industry struck a bad patch it came to the Government and said, we want a bonus, or grant, or a guarantee, or whatever you like to call it, and if you refuse you will receive no votes from us."

The tendency of all democracies to venality and corruption is stressed by many observers. Professor Hearnshaw writes:—"Under the subtle guise of improvement in economic conditions, demands for doles at the public expense are made by powerful sections of the community. Under the camouflage of social reform, demagogues hold out enormous bribes to large groups of the electorate" (*Democracy at the Crossways*, p. 67). After referring to the exposure of the electoral corruption in France and to a similar revelation of the debasement of American institutions from E. L. Godkin in *Problems of Modern Democracy*, Hearnshaw goes on to say "from every other modern democracy the same story of venality comes."

Part V.—Political Parties. A Dangerous Dividing Line.

In the organization of party, sectionalism produces its very worst consequences when it is based upon class. Almost half a century ago, Bryce was very uneasy as to the possibility of a class line of division

between the political parties in the United States of America. After pointing out that since the Civil War combinations of States have always acted through the national parties, he writes:—" This is an important security against disruption, and a similar security against the risk of civil strife or revolution is to be found in the fact that the parties are not based on, nor sensibly affected by, differences either of wealth or social position. The cleavage is not horizontal according to social strata but vertical. . . . It (the vertical cleavage) might cease to be true if the new Labour Party were to grow till it absorbed or superseded either of the existing parties " (*American Commonwealth*, Vol. II. p. 38). What Bryce regarded as an important security against civil strife still obtains in America; but it is surely most ominous to note that this security no longer exists in Australia. The trade unions have become part and parcel of a Parliamentary party; the line of cleavage between the parties is a horizontal one—a line of class. This threatening development, if not entirely due to, has certainly been assisted by, deep-seated defects in the Constitution.

It would be unfair and unreasonable to attach special blame to the trade unions for the deplorable class division in politics. Bryce gave utterance to a profound truth when he said:—" Constitutions are expressions of national character, as they in turn mould the character of those who use them. Forms of government are causes as well as effects." It seems strange that the reaction of the Constitution—the fundamental law—upon the character and conduct of citizens is but little recognised. The influence of other social machinery—legal, educational, religious—is clearly apprehended. It will be contended in the parts of this statement following that the multiplicity of political parties, the disruptive class line between parties, and the evils of other forms of undue sectionalism are the result mainly of defects in the Constitution. The remedies suggested for the removal or mitigation of these evils are (1) the inclusion in the Constitution of a definite method of election designed so as to prevent the debasement of Government through the corruption of constituencies and in other ways; and (2) a complete change in the character and constitution of the Senate.

Part VI.—The Philosophic Basis of the Two-Party System.

The case for the fixation in the Constitution of the electoral method propounded in Part vii of this statement and designed to secure the interplay of two parties only will be immensely strengthened if it can be demonstrated that a two-party system (the British Cabinet system) rests upon a sound philosophic basis. In the histories of the several sciences, and particularly in political history, I find abundant evidence of such a basis. The brief exposition of a philosophy in this part of my statement in which the political aspects are stressed will suggest an underlying synthesis, not only of political science, but of the whole group of social sciences as well. It may be extended even further; it may lead to the widest generalisation of all. Can it be denied that inorganic organic and super-organic or social development are everywhere fulfilled through the interaction of opposing principles?

The primary function of representative government is the organization of national life. In ancient times the problem was to organize each group as a unit against external pressure, and in the military struggle

between the groups those with the best means of organizing survived. In this way natural selection played upon the mechanisms and institutions of society as well as upon the human element. In modern progressive states, however, the external pressure has been relaxed for long periods, notably so in Britain, and the problem of internal organization has presented itself. Representative machinery has solved the problem. There is reason to believe that neither accident nor the inherent political capacity of the British people accounts sufficiently for the solution being found in Britain. Owing to insular position, external pressure was less.

Representation was discovered in Britain in the thirteenth century. The idea of agency was not unknown in the ancient world; but the idea that agents should be invested with power to bind those for whom they acted was new. Those possessing such power become leaders; leadership cannot be given effect to without organization. So we arrive at organization and leadership as the underlying principles of representation. Amplifying this conception somewhat: organization takes the form of party; leadership implies responsibility. The machinery of representation should be so moulded as to give effect to party organization and responsible leadership.

Party organization means two parties only; responsible leadership means the power of a majority behind the leader. Take away that power, split parliament into groups not one of which can command a majority, and clearly, responsible leadership is impossible. It is evident that the principles underlying representation demand that parties shall not be more than two. There are certain other principles of universal application which indicate the same conclusion. They go further: they show clearly what the dividing line between parties has been in Britain and America, and what it should be at all times and in all places.

Bryce has visualized the political history of all nations and constitutions as the ceaseless struggle of forces centripetal and centrifugal. A wealth of instances can be quoted to prove the truth of this wide generalization. In Greece, as Aristotle has demonstrated, there is the cycle from tyranny to anarchy and back again. The ending of the anarchy of the Long Parliament by Cromwell, that of the French Revolution by Napoleon, that of Italy by Mussolini, that of Russia by Lenin, that of Spain by Rivera, are a few of the instances of the alternating phases of centrifugal and centripetal among the moderns. In the sphere of government the opposing principles can be identified as liberty, the extreme of which is anarchy, and authority with its extreme expression in tyranny. In Britain and the United States the phenomena in recent times have been guided into the peaceful vying of liberty and authority; in less advanced countries the expression of the Grecian cycle still obtains. The alternations of liberty and authority were represented in Britain by Roundhead and Cavalier, Whig and Tory, and Liberal and Conservative; in the United States of America by Democrats and Republicans. There is no justification for the one-sided theoretical worship of liberty so prevalent in all democracies; to-day the American nation in establishing a commission of its leading citizens to consider the better enforcement of law recognizes the need for curbing liberty and stressing authority. When the people

of the United States recognize in theory, as they do in practice, that the principle of authority has equal value with that of liberty, they will be impelled to erect the statue of another goddess in New York harbour.

The constant or continuous change, the apparent instability of outlook resulting from the interaction of opposing principles, should, on reflection, excite no wonderment. It is intrinsic in both community and individual. It is an essential to the natural process of evolution. For this antagonism between rival principles is by no means limited to politics. It is to be found in the physical sciences both organic and inorganic. In the realm of natural philosophy it takes shape in the action and reaction of forces; in books on chemistry it finds expression in attraction and repulsion; in the laboratory of the biologist there is patent the evidence of heredity and variation. Centralization and decentralization, integration and disintegration, force and resistance are varying terms for the same fundamental ideas. Since these competing forces are but a manifestation of the natural march of evolution, it should be our aim to select that form of governance that will ensure for us the maximum of good from such phenomena. The ideal government will mitigate the extent of the fluctuations; it will modify effects; it will adjust dislocation in periods of transition; it will substitute moderation for violence. Authority will take the place of tyranny, and liberty of anarchy. The replacement of peaceful oscillations for violent swings between extremes is most likely of realization where the Cabinet system affords a basis of responsible parliamentary government resting upon a sound and sympathetic electoral method. The flexibility of such a system will easily, and with the minimum of passion, enable the change from authority to liberty, and in reverse from liberty to authority; the device or expedient will be a change of ministry. The balance between the opposing forces is in the hands of the people. The Cabinet system, in the last analysis, is the means or machine, and in my belief, the best machine known, by which a democracy may combine the principle of authority stressed by the Tory Hobbes with the principle of liberty expounded by Locke, the philosopher of the Whig Revolution of 1689. The reading of modern British practical politics confirms the thesis that both Hobbes and Locke, taken apart, are incomplete; each sees but one of the requisite factors in the interplay of forces and events, so that in the synthesis each is necessary and supplemental to the due fullness of the other.

Sir John Seeley defines political liberty as "primarily the absence of restraint or the opposite of government; but in a secondary sense, which is also convenient, it is the absence of excessive restraint or the opposite of over-government" (*Introduction to Political Science*, p. 120). Similarly the term authority may be used in a secondary sense. And it is in the secondary sense of both terms that liberty and authority are referred to in this statement as the underlying principles of political party.

Since practice precedes theory, one would expect the principles of party and representation to have shaped the machinery of the British Cabinet system so as to ensure two parties only. Analysis of that system reveals that each convention or working part is so designed. The executive power vested in the Cabinet with the rule that the Cabinet shall resign if it fails to retain the support of a majority tends to the

continuous organization of two bodies of opinion, one for and one against the Ministry; the solidarity of the Cabinet helps to prevent divisions within the Ministerial party and to unite the Opposition; the power of dissolution which resides in the Cabinet enables it to appeal to the country against an adverse majority in the House, thus dividing the electors into two parties, the one in favour of, and the other opposed to, the ministerial programme; the arrangement of seats in the House by which the Ministry and its supporters take their places to the right of the Speaker and the Opposition members range themselves on the left creates a sharp division into two camps. Analysis of the parliamentary mechanism of the British Constitution demonstrates that its unwritten conventions and practices help to organize Parliament into the parties of His Majesty's Ministry and His Majesty's Opposition. The electoral mechanism is not so well cast.

In his recent work, *The End of Laissez Faire,* J. M. Keynes has pointed out that Herbert Spencer was the first to recognize that the parallelism between laissez faire and Darwinism is very close indeed. Spencer and his school taught that political institutions are a natural growth arising out of national character, and that man is the sport of a process of evolution over which he has no control, except to do harm by interference. In the one-sided view of Keynes this school is dead. The opposing school of idealists believe that man can artificially direct the evolutionary process to secure his ends. The half truths embodied in each of these conceptions were long since recognised by Professor Ritchie, who, in his work *Darwinism and Politics,* outlined a definite policy of national progress free from the pessimism of laissez faire and the impracticability of the idealists. Representative government is not a natural growth; nor is it an artificial construction; it partakes of the nature of both. It is the result of the co-operation of man with nature. Each step in its growth is a human invention, which in turn becomes an artificial variation upon which natural selection plays. The lesson is that our only hope of progress lies in improving the machinery of our institutions and harmonising our ideals with them.

An attempt will be made in the part to this statement following to show how the machinery of the British Cabinet system can be improved. The proposal will be designed to prevent more than two parties from entering the political arena. The objection to such a proposal is that the people have a right to divide up into as many parliamentary groups as they please. The answer is that political rights are not absolute; they are relative to the Constitution. To allow an abstract idea of right to block the way to the removal of serious evils such as the corruption of constituencies is indefensible. If there is good reason to believe that the well-being of the people will be promoted by the proposed limitation, it becomes the duty of minorities to work through the constitutional parties. The most important right of a minority is the right to turn itself into a majority if it can. Questions which have no immediate prospect of securing the support of a majority of the people should be kept out of Parliament altogether. The functions of the political machine are to deal with what is practical and attainable and to maintain the conditions under which those questions only shall be raised. The ideals of existing minorities are in harmony with the existing Constitution—they are sectional. The proposed change in the electoral mechanism together with the changes in the distribution of

powers recommended in the minority statement in section xxii. will tend to make those ideals national. The elector in disregarding the temptations of sectionalism and self interest will work the two-party system in the consciousness that he is performing a high ethical duty.

Part VII.—Electoral Systems.

Electoral methods are just as vital to a system of Cabinet government as is the responsibility of the Executive to Parliament. The significance of electoral machinery is insufficiently recognized in our British communities. The electorate is a poorly developed chapter in the scheme of political science; the result is that its regulation is in general relegated to the haphazard mercies of ill-considered legislation. I believe that we should make the same definite provision in the Constitution for the proper functioning of electors as we do for the functioning of members of Parliament. Only in that way will we recognize the true significance of the electorate; only in that way will it be surrounded by the respect and protection that it merits. The machinery available to members of Parliament in the discharge of their function is well cast for securing organization and responsible leadership through the interaction of two national parties; the machinery which the electors have to work in the discharge of a function of equal importance is destructive of party and responsibility. To secure the effective functioning of the whole the two machines must be brought into adjustment. The electors must have the wherewithal to enable them to function properly. I desire to dwell on the importance of the electorate in the make up of the parliamentary system.

The Commonwealth Constitution is the incorporation of the essentials of two constitutions—that of Britain and that of the United States of America, and as I endeavoured to show in Part II. of this statement, it is a combination of machines that are ill suited to such adaptation. I believe that we are similarly at fault in our choice of an electoral system. I believe that we have subjoined to our parliamentary arrangements an electoral edifice altogether foreign to the nature and implications of those arrangements. The fundamental weakness of the single member electorate is that it encourages voters to subordinate national to sectional interests. This evil became so pronounced in Victoria in the case of State railway employees and civil servants that an Act was passed in 1901 giving these bodies separate representation in Parliament. The trouble was that by organizing themselves into a separate section for political purposes, public servants held the balance of voting power in many constituencies. This enabled them to secure pledges for class programmes not in accord with the general weal. Separate representation was enacted as the remedy. The class organisation had been voluntary; under the law it became compulsory. The mischief was transferred from the electorate to Parliament. Public servants are not the only section seeking to exchange votes for concessions, and to penalise one class for a practice that had become general was unfair. After a brief trial the experiment was abandoned.

Another grave defect of the single member electorate is that if more than one candidate of a party is nominated, that party's chances of success are lessened accordingly. To remedy this weakness, pre-selection has become the rule and has generated further evils. It thwarts the

elector in the exercise of his function; it confines his choice to parties; he has no say in the selection of party candidates. What is known as preferential voting has been instituted to obviate the need for pre-selection and widen the elector's choice. It certainly tends to bring more than one candidate into the field for each party, but it sets up an internecine struggle for first preferences. The party becomes disorganised; its campaigning strength is diffused among several candidates. If one party pre-selects, order replaces confusion; the party strength is concentrated on one standard bearer; and when one side pre-selects, the other is compelled to follow suit. Preferential voting has failed completely; it has not put an end to pre-selection; it has intensified the subordination of national to sectional interests. Despite pre-selection, preferential voting tends to bring more than two candidates into the field for each constituency in more ways than one. Calling for a wider choice for electors, it encourages independent candidates and it makes also for party multiplicity. In both the 1914 and 1917 Federal elections there were three constituencies only in which more than two candidates went to the poll. Two parties only were in the field. Preferential voting became law in 1918, and at the next succeeding election in 1919 there were twenty-six electorates with more than two candidates, and as the result a third party of fourteen members made its appearance in the House of Representatives. Preferential voting is a direct encouragement of party multiplicity; on that account it is out of adjustment with the Cabinet system.

Many people favour the Hare system—the single transferable vote for plural member constituencies. Under this device it is possible for a minority of one-sixth in a five-member constituency to secure the return of its candidate. The Hare scheme is well suited to the Swiss referendal system of government; but it is even more out of adjustment with a two-party parliamentary mechanism than preferential voting in single member constituencies. Experience of its application in New South Wales has won for it very few advocates in Australia.

The List method is familiar to the constituencies of continental Europe. It is admirably suited to securing proportional representation for minor groups in plural member constituencies; and like the Hare method it stimulates the group interest to the material detriment and demoralisation of national policy. But it has a distinctive feature which can be made the basis of a method suitable to the Cabinet system —electors vote for a party list instead of for individual candidates. By the expedient of restricting the lists to two and introducing other modifications an electoral method can be secured which will be in perfect adjustment with the parliamentary machinery. I therefore propose such a method of which the following are the essentials:—

1. The Commonwealth shall be divided for electoral purposes into districts, each returning three, four or five members.

2. Before the close of nominations each candidate shall declare to the returning officer for the district in which he stands whether he desires to be classified as a supporter of the Ministry or of the Opposition.

3. Ballot papers shall indicate in every instance whether candidates are Ministerialist or Oppositionist.

4. In the case of electoral districts that are to return three or four members each elector shall be entitled to vote for two candidates; in the case of electoral districts that are to return five members he shall be entitled to vote for three candidates.

5. A unit of representation shall be ascertained in each electoral district by dividing the total number of valid votes cast by the number of members to be returned for that district.

6. In every electoral district the number of aggregate valid votes cast for the Ministerial candidates and the number of aggregate valid votes cast for the Oppositionist candidates shall be divided respectively by the unit of representation, and thereupon each party shall be entitled to the return of a number of members equal to the quotient thus respectively arrived at. In this computation, any fraction less than one-half is ignored; any fraction greater than one-half will count as a whole number.

7. To fill the number of seats ascertained for a party in accordance with proposition number six above the candidates of the party who have received the highest number of votes shall be declared elected.

8. In the event of a tie between candidates the decision shall rest with the returning officer against whose decision there shall be no appeal.

I append in summary form, a table to illustrate how in practice this method will operate. The assumptions are:

(*a*) a five member electorate in which the electors voting number 40,000 and the total valid votes cast is 120,000;
(*b*) twelve candidates are standing;
(*c*) candidates A B C D E F are in the Ministerial interest and candidates G H I J K L are declared Oppositionists.

The distribution of votes is as follows:—

Ministerialists.		Oppositionists.	
A	15,000	G	16,000
B	13,000	H	14,000
C	12,000	I	13,000
D	9,000	J	8,000
E	7,000	K	5,000
F	6,000	L	2,000
	62,000		58,000

The unit of representation being 24,000, the Ministerial party with two units and a remainder of 14,000 is entitled to three seats and the Oppositionist party with two units and a remainder of 10,000 to two seats. A, B, C, G, and H will be declared elected (see propositions 6 and 7 above).

In the last paragraph to this part of my statement I shall endeavour to set out the salient virtues of this electoral mechanism—virtues which in their quality and totality far outweigh any that can be realized in any system of voting of which I am aware.

The issues placed before the elector will be national; there will be no inducement for sectional interests or considerations to be thrust

before him. Suppose that in the illustration just given, candidates D, E and F are canvassing members of an organization such as that of the public servants with the promise of concession or preferment. In that case, Ministerialist supporters may vote for candidates A, B and C without in any way endangering the position of the Ministry or in any way being forced to give their votes to candidates with whose political programme they are out of sympathy. The solid support of Ministerialist suffrages will secure the return of candidates A, B, and C, and the public servants finding that their class vote merely had the effect of increasing the total of one party, would see the futility of voting otherwise than on main party lines. Similarly a Ministerialist elector who may be tempted to vote for a co-religionist in the Oppositionist camp, will, under the method I propose, have a choice of Ministerialist candidates one or more of whom will be acceptable from the standpoint of his religion. In this way provision is made for the elector to vote on national in place of sectarian lines. A trade unionist of moderate views will no longer be compelled to choose at times between class-biassed extremists of either Labour or Capital. Since candidates will each represent various shades or degrees of the respective party policies, an elector will find it possible to award his votes to the wisest, most upright and most moderate members of either or both panels. The elector will no longer find his choice unduly circumscribed at the hustings. The principal incentive to bribery and corruption will be removed. The politician will be little subjected to the temptation of exercising his ingenuity to manipulate electoral boundaries—a practice known as gerrymandering. We shall reasonably look to an improvement in the type of representative in our parliamentary assemblies. Uncontested seats, which for many voters are the equivalent of disfranchisement, will be unknown. We shall escape the necessity for pre-selection and its accompanying evil, party machine control of nominations. No longer will one party out of all proportion be represented in the legislature, for every vote cast will be effective. The fact that one party has more candidates in the field than the other will in no way redound to its prejudice since votes cast for rejected candidates are not lost; they are not ineffective as with our existing methods; they are thrown into the party aggregate. Cross voting is no longer to be feared; it no longer defeats its purpose. In brief we shall by the adoption of this method, I claim, establish a scientific, just and moral electoral system. We shall show that we agree with Aristotle that politics should not be divorced from ethics.

Part VIII.—The Senate.

Of the major parts of the Commonwealth constitutional machinery, the Senate or upper chamber of the Federal legislature is clearly the most defective. The Senate has failed in the aims for which it was designed. Its mission was the safeguarding of State rights against any attempt at Federal encroachment. It was fashioned on the model of the second chamber of the United States But in the process of imitation and adaptation it was emasculated, for the control of foreign policy and appointments to high place—functions that lend a peculiar authority and dignity to the American prototype—were stripped from the Australian body. Our Senate was conceived and born in fear—fear of Federal aggression.

In accordance with the requirements of a federal system, the High Court stands stern guardian to watch over and preserve inviolate the sancity of section 51 of the Constitution—the section which defines, in specific language, the powers allocated to the Federal Parliament. State rights are effectively buttressed: the wide residual powers vested in the States maintain the independent rights of the States. In purpose, therefore, the Senate was a redundancy, and, as would any other organism which has no longer a distinctive and sufficient function to exercise, it is slowly atrophying. Bryce ("Modern Democracies", vol. II., at page 204) passes judgment thus:—"Not having any special functions such as that of control of appointments and of foreign policy which give authority to the American Senate, its Australian copy has proved a mere replica, and an inferior replica of the House". It is not a house of revision; it discharges no function that is not better undertaken by the House of Representatives; it lacks the sense of responsibility which comes from the knowledge that the fate of the government depends on its decision. Obviously, therefore, this unnecessary member should be forthwith lopped off in the general good, or, in the alternative, a new purpose should be infused into its veins. I believe that the Senate should be retained and that it should be reformed into a new life.

A second chamber has a mission to fulfil; it should be composed of experts, technical and philosophic, whose object would be the reviewing or suspending of measures that the lower house has rushed through in an hour of fever or passion. Bryce and de Tocqueville are equally emphatic that the two-chambered co-ordination should be regarded as an axiom of political science. Bicameralism makes due provision for the fire and youthful impetuousity of the first chamber and the sobering hand and reflective mind born of years that will look for a home in a second house. My argument in regard to the Senate is equally applicable to a federal or a unitary system, although it is generally assumed that a Senate representing the States is an essential of federalism. The fact that the Senate has functioned as a party house and not as a states house during the past twenty-eight years shows that the representation of States as States is not necessary.

To secure the best results from a second chamber, I believe that it should be constituted to represent the various interests and vocations in place of States or localities. This is the age of association; in every phase of modern activity a merger impelled by common interests is the integrating force. Group representation must obtain a proper recognition in the ordering of our political life. I believe that we should look to the House of Representatives as the sole body with a territorial basis; the Senate should be confined to the representation of important interests. In my reading I have been greatly impressed with the make-up and function of the German Federal Economic Council, particularly in its relation to the Reichstag. This Council consists of representatives of both employers and employees, and of certain other elements, and by virtue of Article 165 (*a*) of the German Constitution, it is to be so constituted that "all important vocational groups shall be represented thereon according to their economic and social importance." Then sub-section (*b*) of the same Article proceeds:—"All bills of fundamental importance dealing with matters of social and economic legislation shall, before being introduced be submitted by the Federal Government to the

Federal Economic Council for its opinion. The Federal Economic Council shall have the right itself to propose such legislation. In cases where the Federal Government is not in agreement with any such proposal, it shall nevertheless be bound to introduce it into the Reichstag, accompanied by a statement of its view thereon. The Federal Economic Council may arrange for any such proposal to be supported in the Reichstag by one of its members." As comment, I would like to refer to Mr. Herman Finer's annotation of this section—the words are contained on page 102 of his work, *Representative Government and a Parliament of Industry*. He says:—"Clearly the political parliament (the Reichstag) and the people are the final authorities over legislation and the Federal Economic Council is subordinate. It has the right to scrutinise and report upon Government bills, and to initiate, and is guaranteed a certain effect upon the Reichstag through compulsory introduction by the Government, and direct advocacy by one of its members. But it is a consultative, not a decision-making body." Mr. Finer adjudges the results of the Provisional Council thus:—"No Parliament in any of the countries, France, England, Italy, the United States of America, in its full assemblies and its committees, could render such services to the process of government as the discussion and method of work of the Economic Council. Its work is well arranged, simply discussed, thoroughly thought out. It has constructed the proper technical apparatus for Committees, has secured the best personnel for its purposes, it has made a good use of experts, has recognised its duty to come into direct, not second-hand, touch with the interests of the community, and has never forgotten that its great fruitfulness lies in making suggestions and in initiating inquiries and discussions and the providing the Government Departments with reports that contain every element of creative research." The Provisional Economic Council dealt with by Finer is the precursor of the Economic Council to be organised under the Constitution. Speaking of the latter a former Under Secretary of State (Herr Delbruck) said before the National Assembly that the Economic Council is without doubt, by the side of the Reichstag and Reichsrat, a third legislative assembly. For such an assembly, "called upon to deliberate on the most important questions in the national life, will necessarily have a natural tendency to enlarge its powers. We are undoubtedly on the eve of a period in which the Reichstag and the Reichsrat will be considered as on one side of the balance and the Economic Council on the other. Behold in this a wholly new political evolution. There will come a day when the Economic Council will seek to become the heir of Reichsrat and to take its place" (*German Constitution*, pp. 264-269, Rene Brunet).

I commend the Federal Economic Council as a model for our Federal second chamber. In its constitution, of course, it would be widened to include every important interest, economic and otherwise. Such a reform, drastic though it be, would ensure for us that very necessary co-ordination or liaison between industrial and political governance. In Australia, we have, in this respect, a ludicrous severance, fraught with elements of real danger. An objection has been urged that while a second chamber on the lines indicated might be ideal for its purpose, the proposal is of no practical value unless it can be shown how the nominations can be made satisfactorily. On this point the German experience is helpful; the difficulties were overcome. But I am of opinion that a better method can be devised for Australia. Following the German

model to some extent somewhat more than two-thirds of the representation might be given to organisations of employers and employees on the basis of general groupings such as—Agriculture and various branches of rural production; pastoral; mining; manufactures; commerce, banking, insurance; transport.

The remainder of the representation might be given to such bodies as—Universities; public undertakings; liberal professions.

With the exception of Universities and managements of public undertakings for whom suitable special arrangements could be made, any organisation or combination of organisations with a membership of not less than, say, 1000 in the case of employers and 5000 in the case of employees, would be entitled to nominate one or more candidates in accordance with its numerical strength to a panel for the appropriate group. The amount of representation of each group would be determined by its relative importance. All that would remain would be to select the representatives for each group from the panels. It is at this point that difficulty is apprehended. Surely, however, there are several ways in which a satisfactory selection may be made.

The Irish Constitution makes provision for a Senate composed of citizens who have done honour to the nation by reason of useful public service, or "because of special qualifications or attainments, they represent important aspects of the nation's life." A panel of candidates possessing these qualifications having been constituted, selection from among them to the number required is made by members of parliament voting in accordance with the Hare method of the single transferable vote. In my opinion a better method would be to give each nominating organization as many votes as there are vacancies to be filled for the group to which it belongs, and then to allow the votes to count in accordance with the membership strength of the organization. This would mean the application of the Block Vote method, so inequitable when applied to parties, but unquestionably the best when personal qualifications only should be considered. The outstanding objection to the various preferential methods of voting is that sections can ensure the defeat of a general favourite. The Block Vote principle obviates this danger. It assists the return of men of breadth and vision—the candidates in favour with all sections.

The method of selecting nominees for the panels might well be left to the organizations. This would admit of the simple procedure of determination by the executive of the body. On the other hand, if desired, the matter could be decided by a ballot of members, and in this event, the Block Vote method should be used.

A bicameral legislature on the lines indicated herein should give every satisfaction. The territorial constituencies of the House of Representatives, the Cabinet system, the new electoral procedure after the manner that has been suggested in Part VII. of this statement would provide the underlying structure of the people's house; the Senate, recast along the lines indicated to convert it into a body of experts, would be, in effect, a chamber advisory, revisory and suspensory in nature, with a special mission to protect minorities. In this way the essential play of the centripetal and centrifugal principles would be achieved Parliament would be truly representative of the general

interest and of the various sectional interests, and in practice would be a reconciliation of the opposing monistic and pluralistic conceptions of the State. For the theoretical reconciliation students of political science are referred to Part VI. of this statement.

Part IX.—The Seat of Government.

Section 125 is one of the compromises of the Constitution. In the belief that the people of New South Wales would not vote for Federation if the way was left open for Melbourne to become the capital of Australia, and that the people of Victoria would object equally to Sydney, both cities were ruled out by the provision that "the seat of Government shall be in the State of New South Wales and be distant not less than one hundred miles from Sydney".

The consequences of section 125 are, in my opinion, disastrous. Canberra is a heavy, unnecessary and increasing burden upon the people. It is remote from the centres of population and main lines of transport. The surrounding area is of such a character as to afford no basis for the establishment of industries. Public servants all the time, and members of Parliament when the Houses are in session, are cut off from the life and interests of the people. The character of government must suffer because (*a*) many of those best qualified to discharge legislative and administrative functions will refuse to live in Canberra, and (*b*) those who live there, lacking the stimulus of contact with the big community interests, will be less fit to deal with the problems of government.

The direct and indirect costs due to the disabilities of government in Canberra must grow with the development of Australia. I am convinced that it would be good policy to cut the loss at the earliest possible moment.

I recommend that section 125 be deleted so as to remove all restrictions on the discretion of Parliament regarding the matter of the seat of government, or alternatively that the section be so amended as to remove the obstacles now existing to the establishment of the seat of government at Sydney or in any other part of New South Wales.

Part X.—Addendum.

It is now a generation since our Constitution became law. Constitutions are relative; they must be amended to suit the changing requirements of their people. But I go further. The conclusions of the framers of our Constitution were more or less influenced by extraneous pressure the chief of which was State interests. What is known as the "Federal Compact" was a compromise; the colonial politicians feared the overriding power of an Australian Parliament. We need from time to time to revalue our values. Above all, we must recognize that it is no longer necessary to compromise on essential principles. To examine afresh the foundations of the Constitution denotes no lack of respect or gratitude for those who took part in the several Conventions; it passes no necessary or implied reflection on their labours. In the light of the experience of 28 years we are now called upon to review their judgment.

T. R. ASHWORTH.

SUPPLEMENT AND RECOMMENDATIONS BY SIR HAL COLEBATCH.

Whilst cordially endorsing the report so far as it sets out the powers of the Commonwealth Parliament, and reviews the working of the Constitution since the commencement of Federation, I am unable to agree with the majority of my colleagues in regard to some of the recommendations. I think it desirable to emphasize the fact that I am the only member of the Commission who has been closely associated with the public life of one of the outlying States of smaller population. From this circumstance I approached the task entrusted to the Commission with a somewhat different outlook from that of my fellow members whose activities have been chiefly connected with the central States of New South Wales and Victoria, but, in common with other members of the Commission, I have considered every question in relation to Australia as a whole as well as in relation to particular States.

Unequal operation of Federal Policy.

The investigations made by the Commission in the different States, and the evidence tendered in Western Australia, South Australia and Tasmania, indicate that certain phases of Commonwealth policy—whatever their immediate effect upon Australia as a whole—have been seriously detrimental to those States of smaller population that depend for the most part upon primary production. The public finances and the commercial and industrial development of those States have been prejudiced to an extent quite incompatible with the requirements of a Federal union, and dangerous to the well-being and progress of the Commonwealth as a whole.

It is not without significance that this conclusion is in accordance with the findings of the three royal commissions—in each case composed of persons entirely dissociated from the States concerned—that have made independent inquiries into the disabilities of the States of Western Australia, Tasmania, and South Australia. The same opinion was expressed by the Imperial Economic Delegation that recently visited Australia, and by the informal committee of experts set up by the Prime Minister to report on the economic effects of the Australian tariff. From the reports of these bodies, and the evidence submitted to this Commission, it appears to me to be clear that a condition of affairs has been created that cannot be met by temporary grants or other forms of palliative. The continued prosperity and advancement of the Commonwealth must depend very largely on the capacity of the now sparsely peopled States to exploit their resources and to absorb additional people—results that cannot be achieved unless they are accorded a sufficient measure of financial and economic freedom to enable them to work out their own salvation.

On this point I desire to direct attention to the statement submitted to the Commission by Professor J. B. Brigden and Mr. L. F. Giblin, M.A., appearing on pages 1700 to 1710 of the evidence, and also to the concluding pages of the report of the informal committee of experts already referred to and which consisted of J. B. Brigden, M.A., Economist and Deputy Chairman of Executive, Australian Overseas Transport Association; D. B. Copland, M.A., D.Sc., Professor of Commerce, University of Melbourne; E. C. Dyason, B.Sc., B.M.E.; L. F. Giblin, M.A., Ritchie Professor of Economics, University

of Melbourne; C. H. Wickens, I.S.O., F.I.A. F.S.S., Hon. M.S.S. (Paris), Commonwealth Statistician and Actuary. In Appendix W to its report the committee of experts declares that "the unequal effects between States are probably the most embarrassing consequences of the tariff", and that the tariff has "materially affected the relative prosperity of the different States". As indicating the very marked difference in the effect of the tariff on different States, the committee points out that the subsidies to production through the tariff are twice as great per head of population in Victoria and Queensland as in Western Australia, South Australia and Tasmania, whilst on the other hand the costs of protection fall much more heavily on the three latter States. Summarizing its conclusions regarding these States the committee says: "Their taxable capacity is lowered, so that their rates of taxation have to be increased; industry is further encouraged to concentrate in the more fortunate States, and the cumulative effects which follow intensify the inequalities created by the tariff itself".

It was pointed out in evidence before this Commission that similar disabilities to those imposed upon States depending chiefly on primary production are equally imposed upon the pastoral and agricultural portions of other States. From the constitutional point of view, however, as regards the relationship of the Commonwealth to the States, I am at the moment concerned with the unequal operation in the different States, rather than with inequalities as between city and country in the same State: a matter which is probably of quite equal importance.

Constitutional and other causes of inequality.

The constitutional defects that have made these inequalities possible are not obvious. I am, however, strongly of opinion that whilst some disability is inseparable from the position of a weaker member in a Federal partnership, the disabilities have been intensified by (*a*) the unexpected operation of certain provisions of the Constitution; and (*b*) the unexpected expansion of Federal powers and activities. Under the first of these headings I would include (1) the fact that the Senate has largely failed to function as a States house, having become, after the first few years of Federation a party chamber; (2) the obstacles which have been raised against members of the State legislatures—whose experience should peculiarly fit them to represent the State—seeking election to the Commonwealth Parliament (*Commonwealth Electoral Act* 1902, section 96, and *Commonwealth Electoral Act* 1921, section 2); and (3) the system of appropriating Commonwealth revenue which has been adopted ever since the *Surplus Revenue Act* 1908, and which has prevented there being any surplus revenue for the States under section 94 of the Constitution or under the provisions of the *Surplus Revenue Act* 1910 or the *States Grants Act* 1927.

Under the second heading a long list of the expansion of Federal powers and activities might be compiled, but I shall quote only a few characteristic examples:—

1. The extension of paragraph xxxv. of section 51 of the Constitution to cover almost any form of industrial dispute in almost any kind of industry anywhere in the Commonwealth.

2. The extension of the same paragraph to cover State instrumentalities notwithstanding two previous contrary decisions of the High Court, and in opposition to the will of the Australian people as expressed by referendum.

3. The imposition of a Commonwealth land tax with the object of influencing the land settlement policies of the States.

4. The establishment of the Commonwealth Savings Bank in competition with the State Savings Banks.

Important lessons are to be learned from the working of the Constitution in regard to the operation of sections 81, 94 and 96. The fact that the Commonwealth has acted as if it had an unrestricted power of appropriation has had a serious influence on both Commonwealth and State finances. With large surpluses the Commonwealth has been led into avenues of expenditure which do not seem to have been contemplated by the framers of the Constitution, such as the Maternity Allowance Act and the Federal Aid Roads Act, and some of which have affected matters within the sphere of the States. Much of the money so expended should, in my opinion, have been treated as surplus revenue distributable amongst the States. The evidence shows that in the years of big Federal surpluses the States were short of the revenue required to meet the ordinary responsibilities of government.

Financial relations of Commonwealth and States.

I am unable to regard the financial agreement as either a final or complete settlement of the financial relations of the Commonwealth and the States. It has a currency of over half a century, but it is obvious that long before the expiration of that period a distribution of money amongst the States on the basis of their population in 1926 must become inequitable.

The financial relations of the Commonwealth and the States must always be the crucial factor in any Federal compact. It is in this respect more than in any other that the Constitution has proved difficult to work. I am strongly of opinion that it would be in the interests of all parties if there were clearly expressed in the Constitution the rights of the States to a fixed proportion of customs and excise revenue, say one third. Money raised by indirect taxation is "easy money" contributed by people who do not realize that they are paying it. This "easy money" should be distributed between the Commonwealth and the States with due regard to their respective obligations, and on each should be cast the necessity of completing its requirements by such measure of direct taxation as would stimulate the interest of the taxpayer in the manner in which the money is spent. I am in entire accord with the opinion expressed by several witnesses and emphasized in the report of the unofficial committee of experts from which I have already quoted that the present undue proportion of indirect as compared with direct Commonwealth revenue is detrimental to persons of small income, and to most of our primary industries, and productive of serious inequalities as between the States. If the Constitution were amended to secure to the States a fixed proportion of the indirect taxation, such proportion might be equitably divided amongst the States on the basis of population at the time of distribution, qualified by adequate allowances for disabilities sustained by some States, and advantages gained by others, as the results of Federal policy. A body

endowed with such powers as the Constitution contemplated for the Inter-State Commission and composed largely of technical and expert members would be competent to advise Parliament on this matter. Its conclusions would be as little subject to error as are those of the authorities who now determine, periodically, the cost of living in each State of the Commonwealth. There is also a great deal to be said in favour of the proposal submitted by certain witnesses that all income tax should be collected on a Federal basis, thereby facilitating the aggregating of incomes and the taxation of interest on Commonwealth and State loans. The amount of the Commonwealth tax would be fixed by the Commonwealth Parliament, and the respective amounts of the State taxes by each of the State Parliaments.

In regard to certain matters—such as Health—it has been urged before the Commission that an enlargement of Commonwealth powers is desirable on the ground that the Commonwealth is better able to afford suggested increased expenditure than are the States. I am entirely out of sympathy with this argument for the following reasons:—

1. Central finance and central control have always meant largely increased expenditure in proportion to the service rendered. The enormous increase in the cost of education in England since its financing became chiefly a responsibility of the national exchequer is an illustrative instance. Australian experience furnishes many others.

2. If after carrying out the functions entrusted to it by the Constitution the Commonwealth still has money to spare it should be distributed amongst the States—for State purposes—in accordance with section 94.

Taxation of State imports.

The failure of section 114 to protect State importations against customs taxation is mentioned in the report. There are certain features of this matter that I desire to emphasize.

1. The imposition of high customs duties on materials required for developmental purposes has operated to the detriment of those States which, at the time of Federation, were relatively undeveloped. Other States had developed their territory, to a greater extent, under a system of duty-free government imports. A comparison of the borrowings per head of population, before and after Federation, of, say, Victoria and Western Australia, gives some indication of the extent to which the latter State has been penalized.

2. The method of determining whether or not remission of taxation in such cases should be allowed (decision by the Minister for Customs) has not always given satisfaction.

3. When extensive borrowings are associated with a high protective policy, it is inevitable that a certain proportion of the money raised by loans abroad will find its way into revenue in the form of customs duty on goods imported by private persons and purchased with the proceeds of such loans; but a system under which, year by year, a considerable percentage of all State loans raised in London becomes ordinary Commonwealth revenue in Australia demands grave consideration.

Previous attempts at amendment.

It is mentioned in the report that, except as regards the question of State debts, the people of Australia have negatived every proposal that has been submitted to them to enlarge the powers of the central government; and that at the referendum of 1926 the negative majorities were much greater than on the occasion of previous and similar references. I do not interpret this as an indication that the Constitution is too rigid. It is by no means apparent that advantage would have accrued to Australia had any or all of the rejected proposals been carried. It may be claimed that their rejection is an evidence of the sound judgment of the Australian people, rather than an argument for providing greater facilities for amendment. The increased negative majorities in the later referendums may be regarded as suggestive of a growing appreciation of the Federal character of the Constitution.

Dissent from recommendations.

It only remains for me to set out in a few words my reasons for dissenting from certain of the recommendations submitted by the majority of my colleagues.

Aviation.

I am of opinion that sufficient uniformity in regard to air navigation can be obtained by arrangement between the Commonwealth and the States, more readily than it has been obtained between contiguous countries on the Continent of Europe. At the most it may be desirable for the State Parliaments to transfer an aviation power, with certain reservations, to the Commonwealth. Colonel Brinsmead, officer in charge of Civil Aviation, Defence Department, told the Commission (page 278) that a transference of power with such reservations "would meet with government requirements absolutely."

In the near future transport by air will play an important part in the ordinary life of the community. Such features of air navigation as intra-state trade and commerce, industrial conditions, and the ordinary police power are better left to the States. The adoption of the recommendation of my colleagues would bring all these under central control, whilst similar matters in regard to other forms of intra-state transportation would remain with the States.

Company Law and Partnerships.

On these matters I take the view of the Committee of Counsel of Victoria quoted on pages 209-211 of this report. All the uniformity that is necessary or desirable can be obtained by State legislation. The advantages of uniformity were urged before the Commission, but always in a general, and to my mind, unconvincing manner, whilst the probable disadvantages of central control were concisely submitted in the statement already referred to, and in the evidence of Mr. E. E. S. Layton (p. 1259), Mr. T. P. Derham (p. 683), and several Tasmanian and other witnesses. I have reason for saying that the operation of the Federal Bankruptcy Act has disillusioned many who previously believed that advantage would result from the exercise of central authority in such matters.

As indicating a probable result of the transference of even the restricted powers suggested by certain of my colleagues I would instance the fact that Victorian company law encourages proprietary companies, and much of the trade of the State is done by such companies; New South Wales law does not permit proprietary companies. I express no opinion as to the utility or otherwise of such companies, but I hold that the power of defining the sort of companies that may operate should lie with the authority that controls the trade and commerce in which they engage.

Health. Food and Drugs. Registration of Doctors, &c.

I have been unable to discover how an additional health power will enable the Commonwealth to do any good service to the Australian people that it is now prevented from doing. In considering other matters it is constantly urged that overlapping, conflicting powers, and divided responsibilities cause inconvenience, inefficiency and unnecessary expense. It is unthinkable that local control should be eliminated from health administration, and any effective health power given to the Commonwealth must necessarily mean a duality of responsibility. In health and all the cognate matters associated with it strict uniformity is the last thing that is desirable. Research by both Commonwealth and States, fairly frequent conferences, and close co-operation for the spreading of progressively improving methods in conformity with the requirements and conditions of each portion of Australia, will lead to better results than the exercise of any overriding central power, no matter how guarded may be the words in which such central power is conferred.

Navigation.

The navigation power should rest with the trade and commerce power. Intra-state trade and commerce and all the transport activities associated with it—whether by road, rail, sea or air—should be left with the States. The uniformity required is in the laws controlling the trade and commerce of a State, not in the method of running ships or trains all over Australia. The evidence given in Western Australia, South Australia and Tasmania, regarding the effects of the Commonwealth navigation legislation on their interstate trade, suggests that the people of those States would view with consternation a proposal that intra-state navigation should be subjected to any form of Commonwealth influence. The extent to which outlying communities—often of a pioneering character—depend upon intra-state navigation makes it essential that this should be within the unfettered control of the local legislatures, where the circumstances are clearly understood.

From time to time minor difficulties may arise from dual control in harbours used alike for inter-state and intra-state navigation, but the evidence shows that these have been overcome readily, and that there is no serious friction between Commonwealth and State administration under the existing system.

Judicial Powers.

I hesitate to express any opinion varying from that of colleagues so much better qualified to pronounce upon this matter. There may be virtue in a system which secures uniformity in high judicial decision throughout the Empire, and consequently I should be loth to urge any

further restriction of the right of appeal to the Privy Council. Regarding the suggestion that the High Court should be empowered to give advisory opinions, it seems that if such opinions are not to be final they must be of limited utility, even if they do not set up a false sense of security. To make them final would be to provide that lasting decisions on matters of grave importance are to be reached by other than the best method—the argument of a concrete issue with the interested parties adequately represented. With these qualifications I concur in the recommendations under this heading.

New States.

I approve of this recommendation, excepting that I do not think the Commonwealth Parliament should be empowered to override a majority in the State concerned. I also feel that the proposed amendment, in that particular, would have little chance of acceptance since, for general application it would require—in the terms of the closing paragraph of section 128—an affirmative majority in each of the six States; or for restricted application an affirmative majority in Australia, and in four of the six States including the one in which it was to be applied. It seems improbable that a majority of the people in any State would vote for their own disfranchisement in such a matter.

Defence.

I agree that the defence power of the Commonwealth should be absolute. It does not appear that the limitation referred to has created any serious difficulty, and I feel that no good purpose will be served by inserting in the Constitution a provision specifically authorizing the Commonwealth to establish and conduct business concerns that might be associated to a small extent only with defence.

Election of Senators.

The Constitution as it stands authorizes Parliament to prescribe the method of choosing senators. If the Parliament sees fit it can adopt a system of proportional representation, and it would be much more likely to embark upon such an experiment with its right of retreat unfettered, than to invite the electors to put into the Constitution a provision tying the hands of Parliament.

HAL COLEBATCH.

Supplement and Recommendations by Mr. Duffy and Mr. McNamara.

In order to give effect to the conclusions of Messrs. Ashworth, Duffy and McNamara, set out in section xxii. of this report, and the recommendation that the Constitution be amended so as to enable the Commonwealth Parliament to alter the Constitution as and when considered desirable, but in order to secure the control of Parliament by the people, we recommend that certain provisions, *e.g.* adult franchise, extension of the life of Parliament and the initiative referendum and recall, should be alterable only by a vote of the people. Other matters affecting the liberty and rights of the people, such as present sections 80 (trial by jury), 116 (religious freedom), and the questions of conscription for military, naval or industrial service, should also be beyond the power of Parliament to alter, as well as the provisions for protecting the representation in the central Parliament of the small States, but we consider the elimination of the restriction in the last paragraph of section 128 relating to the "increasing, diminishing, or otherwise altering the limits of the State" desirable, as its retention may tend to operate against facilities for the establishment of new States.

We are of opinion that in submitting any amendments to the electors for decision a majority of the people should be sufficient to determine the issue.

We suggest that, whatever proposals may be eventually placed before the electors as the result of this report, the opportunity be given the people to vote upon this issue as an alternative to any other proposed amendments.

We recommend that the Constitution be amended by omitting section 128 and by inserting the following section:—

> "128: The Constitution may be altered in the following manner:—
>
> The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, provided that at least one month must elapse between the second and the third reading of the bill in the House of Representatives.
>
> No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, shall become law unless the majority of the electors voting in that State approve the proposed law.
>
> Notwithstanding anything hereinbefore contained, sections 8, 28, 30, 60A, 80 and 116 of this Constitution shall not be altered, except in the following manner:—
>
> The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted to the electors qualified to vote for the election of members of the House of Representatives.
>
> When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes.
>
> If a majority of all the electors voting approve the proposed law, it shall be presented to the Governor-General for the King's assent".

Adult Franchise.

In order to place adult franchise beyond doubt, we recommend that section 8 be amended to read as follows:—

"The qualification of an elector of members of the House of Representatives shall be that he is a natural-born or naturalized subject of the King of the age of 21 years and upwards, and that he is an inhabitant of Australia and has lived therein for at least six months."

and that section 30 be amended to read as follows:—

"The qualification of an elector of members of the Senate shall be that he is a natural born or naturalized subject of the King of the age of 21 years and upwards, and that he is an inhabitant of Australia and has lived therein for at least six months."

Conscription.

We recommend that a new section be inserted in the Constitution to prevent the conscription of persons for naval, military or industrial service:—

60A. No person shall be conscripted under any law of the Commonwealth for naval military or industrial service.

Alternative Recommendations.

Should the above recommendations not be accepted, we recommend that the Constitution should be amended to give full power to the Commonwealth Parliament on the following subjects in addition to those recommended in section xxiii. of this report:—Health, industrial matters, trade and commerce, railways, aborigines, fauna and flora, fisheries and forestry.

The reasons in favour of giving the Commonwealth full power in regard to trade and commerce, and industrial matters, are set out in section xxii., pp. 243-247.

Health.

In our opinion research into the causes and the means of prevention of disease should be concentrated under a central authority so that the best brains and the highest degree of knowledge obtainable should be available to the whole people.

Expert witnesses called before the Commission agreed in saying that the States were financially unable to provide for the supervision of measures for public health which they thought advisable. Evidence to this effect was given by officials of all the States with the exception of Victoria. We think that if the power is treated as concurrent, no difficulty will arise owing to the administration of public health measures through local government bodies. This difficulty was suggested, and cannot be ignored, but we think that it is outweighed by the benefits which would be received through the power of the Parliament to pass preventive as well as quarantine measures for the whole of Australia.

Mr. Ashworth.—Mr. Ashworth concurs.

Railways.

We recommend that the Commonwealth Parliament should have power over railways. The advantages of central control were stressed by expert witnesses (*see* section xx., p. 226).

Mr. Ashworth.—Mr. Ashworth concurs.

Aborigines, Fauna and Flora, Fisheries and Forestry.

The recommendation regarding aborigines is based upon the responsibility of the nation as a whole to care for the aboriginal native races of this country. It is hardly fair that the burden of caring for the natives should rest upon the States which have small populations but in which the bulk of the natives are, while the more settled States have little or no financial responsibility in the matter. The national Parliament should see that all carried their fair share of burden in respect to the displaced native races, and should accept the responsibility for their well-being.

As regards fauna and flora there is a national responsibility to see that these assets are not destroyed, as is always possible when matters of this kind are left to local determination and the pressure of local interests.

Fisheries and forestry are capable of great development, and in order that the Commonwealth may assist in this development it is necessary that the Commonwealth Parliament have the power to do so (*see*, as to fisheries, the evidence of D. G. Stead, p. 260).

There is also an aspect of forestry that requires consideration from a national authority, that is, the protection of the forest cover of water catchment areas of rivers that supply more than one State with water. The timber thereon may have no commercial value, but by neglect may become depleted through fire or other causes, and thus affect the supply of water to a State having no control over the catchment area.

Mr. Ashworth.—Mr. Ashworth concurs.

Right of Public Servants to stand for Parliament.

In our opinion there is no reason why a Federal public servant should be debarred from exercising the same rights as other citizens of the Commonwealth. He should be entitled to stand for election to the Commonwealth Parliament without the necessity of resigning his position in the public service, but should he be elected, his resignation should take effect from the date of his being declared elected.

Right of State Employees to approach Federal Court.

In our opinion any attempt to deprive State government employees of the right to approach a Federal industrial tribunal is unfair, as all employees should have the right to approach an independent tribunal for the adjustment of their industrial relations, and instead of restriction of the right as contained in the majority recommendation we recommend that the right should be extended to cover all State employees.

Life of Parliament.

We do not agree with the recommendation that the life of Parliament should be increased to four years. In our opinion the present term is quite long enough and does not give the electors more than a reasonable control over their representatives in Parliament. The reasons set out for the proposed change do not appear to us to merit consideration, as it is within the control of members to alter the present method of spending the first session in reviewing the election and the last session in preparing for the next. The greater the control of Parliament by the electors the better for the people, and the lengthening of the term of Parliament tends to weaken this control.

Mr. Ashworth.—Mr. Ashworth concurs.

Judicial Powers.

While accepting the recommendations in this report as a means of rectifying some of the troubles associated with the present system of administering justice in the Commonwealth, we do not think that they go far enough, and we think that the better plan would be to make the High Court of Australia the final court of appeal in all cases. This would not only make it possible to arrange a procedure as to cases through the State Courts without any doubt as to the High Court's jurisdiction in cases involving the interpretation of the Constitution, but would also be in line with Australian sentiment and would assist in making this country self-contained as to its law-making and its judicial decisions. In our opinion Australia should be capable of producing a judiciary as high in standard as any other parts of the British Empire.

Senate Casual Vacancies.

We recommend that an amendment be made in section 15 of the Constitution to enable a casual vacancy in the Senate to be filled by the more popular House of the State Parliament, instead of by a joint sitting of both Houses. As the more popular House of the State Parliaments is elected on the basis of adult franchise, it is more in line with the principle of adult franchise for the vacancy to be filled in this way.

M. B. DUFFY.
D. L. McNAMARA.

We have the honour to be,

Your Excellency's most obedient servants,

J. B. PEDEN, Chairman.

P. P. ABBOTT
T. R. ASHWORTH
E. K. BOWDEN
HAL COLEBATCH
M. B. DUFFY
D. L. McNAMARA
} Commissioners.

J. G. HARDMAN, Secretary.

Canberra, 7th September, 1929.

APPENDIX A.

THE COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT

as altered by

CONSTITUTION ALTERATION (SENATE ELECTIONS) 1906 (No. 1 OF 1907),

by

CONSTITUTION ALTERATION (STATE DEBTS) 1909 (No. 3 OF 1910),

and by

CONSTITUTION ALTERATION (STATE DEBTS) 1928 (No. 1 OF 1929).

(63 & 64 VICT. CHAPTER 12.)

An Act to constitute the Commonwealth of Australia.

[9th July, 1900.]

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Commonwealth of Australia Constitution Act. Short title

Act to extend to the Queen's successors.

2. The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

Proclamation of Commonwealth.

3. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

Commencement of Act.

4. The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

Operation of the Constitution and laws.

5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

Definitions

6. "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

"The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State."

"Original States" shall mean such States as are parts of the Commonwealth at its establishment.

Repeal of Federal Council Act.

48 & 49 Vict. c. 60.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

Application of Colonial Boundaries Act.

58 & 59 Vict. c. 34.

8. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

9. The Constitution of the Commonwealth shall be as follows:— Constitution.

THE CONSTITUTION.

This Constitution is divided as follows:—

Chapter I.—The Parliament:

Part I.—General:

Part II.—The Senate:

Part III.—The House of Representatives:

Part IV.—Both Houses of the Parliament:

Part V.—Powers of the Parliament:

Chapter II.—The Executive Government:

Chapter III.—The Judicature:

Chapter IV.—Finance and Trade:

Chapter V.—The States:

Chapter VI.—New States:

Chapter VII.—Miscellaneous:

Chapter VIII.—Alteration of the Constitution.

The Schedule.

CHAPTER I.—THE PARLIAMENT.

CHAPTER I. THE PARLIAMENT

PART I.—GENERAL.

PART I. GENERAL.

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth." Legislative power.

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him. Governor-General.

3. There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds. Salary of Governor-General.

The salary of a Governor-General shall not be altered during his continuance in office.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth. Provisions relating to Governor-General.

5. The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives. Sessions of Parliament. Prorogation and Dissolution.

After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs. Summoning Parliament.

First session.

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

Yearly session of Parliament.

6. There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

PART II.—THE SENATE.

PART II. THE SENATE.

The Senate.

7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

Qualification of electors.

8. The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

Method of election of senators.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

Times and places.

The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

Application of State laws.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

Failure to choose senators.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

Issue of writs.

12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

13. As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of ~~the third year~~, **three years**, and the places of those of the second class at the expiration of ~~the sixth year~~, **six years**, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service. **Rotation of senators.** **Altered by No. I, 1907, s. 2.**

The election to fill vacant places shall be made ~~in the year at the expiration of which~~ **within one year before** the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of ~~January~~ **July** following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of ~~January~~ **July** preceding the day of his election.

14. Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation. **Further provision for rotation.**

15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens. **Casual vacancies.**

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives. **Qualifications of senator.**

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President. **Election of President.**

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

Absence of President.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

Resignation of senator.

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

Vacancy by absence.

20. The place of a senator shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the Senate, fails to attend the Senate.

Vacancy to be notified.

21. Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

Quorum.

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in Senate.

23. Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

PART III. HOUSE OF REPRESENTATIVES.

PART III.—THE HOUSE OF REPRESENTATIVES.

Constitution of House of Representatives.

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:—

(i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:

(ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

Provision as to races disqualified from voting.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

26. Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows:— Representatives in first Parliament.

New South Wales	twenty-three;
Victoria	twenty;
Queensland	eight;
South Australia	six;
Tasmania	five;

Provided that if Western Australia is an Original State, the numbers shall be as follows:—

New South Wales	twenty-six;
Victoria	twenty-three;
Queensland	nine;
South Australia	seven;
Western Australia	five;
Tasmania	five.

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives. Alteration of number of members.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General. Duration of House of Representatives.

29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States. Electoral divisions.

In the absence of other provision, each State shall be one electorate.

30. Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once. Qualification of electors.

31. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives. Application of State laws.

32. The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives. Writs for general election.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ. Writs for vacancies.

Qualifications of members.

34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—

(i) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:

(ii) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

Election of Speaker.

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.

Absence of Speaker.

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

Resignation of member.

37. A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

Vacancy by absence.

38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.

Quorum.

39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

Voting in House of Representatives.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

PART IV. BOTH HOUSES OF THE PARLIAMENT.

PART IV.—BOTH HOUSES OF THE PARLIAMENT.

Right of electors of States.

41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

Oath or affirmation of allegiance.

42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorized by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House. Member of one House ineligible for other.

44. Any person who— Disqualification.

(i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or

(ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or

(iii) Is an undischarged bankrupt or insolvent: or

(iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

(v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

45. If a senator or member of the House of Representatives— Vacancy on happening of disqualification.

(i) Becomes subject to any of the disabilities mentioned in the last preceding section: or

(ii) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

(iii) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction. Penalty for sitting when disqualified.

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises. Disputed elections

Allowance to members.

48. Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

Privileges, &c., of Houses.

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Rules and orders.

50. Each House of the Parliament may make rules and orders with respect to—

(i) The mode in which its powers, privileges, and immunities may be exercised and upheld;

(ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

PART V. POWERS OF THE PARLIAMENT.

PART V.—POWERS OF THE PARLIAMENT.

Legislative powers of the Parliament.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i) Trade and commerce with other countries, and among the States:

(ii) Taxation; but so as not to discriminate between States or parts of States:

(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:

(iv) Borrowing money on the public credit of the Commonwealth:

(v) Postal, telegraphic, telephonic, and other like services:

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:

(vii) Lighthouses, lightships, beacons and buoys:

(viii) Astronomical and meteorological observations:

(ix) Quarantine:

(x) Fisheries in Australian waters beyond territorial limits:

(xi) Census and statistics:

(xii) Currency, coinage, and legal tender:

(xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:

(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:

(xv) Weights and measures:

(xvi) Bills of exchange and promissory notes:

(xvii) Bankruptcy and insolvency:

(xviii) Copyrights, patents of inventions and designs, and trade marks:

(xix) Naturalization and aliens:

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

(xxi) Marriage:

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

(xxiii) Invalid and old-age pensions:

(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:

(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:

(xxvii) Immigration and emigration:

(xxviii) The influx of criminals:

(xxix) External affairs:

(xxx) The relations of the Commonwealth with the islands of the Pacific:

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:

(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:

(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:

(xxxiv) Railway construction and extension in any State with the consent of that State:

(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:

(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:

(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Exclusive powers of the Parliament.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:

(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:

(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

Powers of the Houses in respect of legislation.

53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Appropriation Bills.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

Tax Bill.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Recommendation of money votes.

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

Disagreement between the Houses.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same

or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure. **Royal Assent to Bills.**

The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation. **Recommendations by Governor-General.**

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known. **Disallowance by the Queen.**

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of Parliament, or by Proclamation, that it has received the Queen's assent. **Signification of Queen's pleasure on Bills reserved.**

CHAPTER II. THE GOVERNMENT.

CHAPTER II.—THE EXECUTIVE GOVERNMENT.

Executive power.

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Federal Executive Council.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

Provisions referring to Governor-General.

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Ministers of State.

64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Ministers to sit in Parliament.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

Number of Ministers.

65. Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

Salaries of Ministers.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

Appointment of civil servants.

67. Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

Command of naval and military forces.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

Transfer of certain departments.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth:—

Posts, telegraphs, and telephones:
Naval and military defence:
Lighthouses, lightships, beacons, and buoys:
Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires. Certain powers of Governors to vest in Governor-General.

CHAPTER III.—THE JUDICATURE.

CHAPTER III. THE JUDICATURE.

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes. Judicial power and Courts.

72. The Justices of the High Court and of the other courts created by the Parliament— Judges' appointment, tenure, and remuneration.

(i) Shall be appointed by the Governor-General in Council.

(ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

(iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences— Appellate jurisdiction of High Court.

(i) Of any Justice or Justices exercising the original jurisdiction of the High Court:

(ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or or any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

(iii) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

Appeal to Queen in Council.

74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

Original jurisdiction of High Court.

75. In all matters—

(i) Arising under any treaty:
(ii) Affecting consuls or other representatives of other countries:
(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
(iv) Between States, or between residents of different States, or between a State and a resident of another State:
(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

Additional original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

(i) Arising under this Constitution, or involving its interpretation:
(ii) Arising under any laws made by the Parliament:
(iii) Of Admiralty and maritime jurisdiction:
(iv) Relating to the same subject-matter claimed under the laws of different States.

Power to define jurisdiction.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

(i) Defining the jurisdiction of any federal court other than the High Court:
(ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:
(iii) Investing any court of a State with federal jurisdiction.

Proceedings against Commonwealth or State.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes. Number of judges.

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes. Trial by jury.

CHAPTER IV.—FINANCE AND TRADE.

CHAPTER IV. FINANCE AND TRADE.

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution. Consolidated Revenue Fund.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth. Expenditure charged thereon.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law. Money to be appropriated by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth. Transfer of officers.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth, and were retained in the service of the Commonwealth.

Transfer of property of State.

85. When any department of the public service of a State is transferred to the Commonwealth—

(i) All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary:

(ii) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth:

(iii) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament:

(iv) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

Uniform duties of customs.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

Payment to States before uniform duties.

89. Until the imposition of uniform duties of customs—

(i) The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

(ii) The Commonwealth shall debit to each State—

(*a*) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth;

(*b*) The proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth.

(iii) The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive. **Exclusive power over customs, excise, and bounties.**

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods. **Exceptions as to bounties.**

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. **Trade within the Commonwealth to be free.**

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides— **Payment to States for five years after uniform Tariffs.**

(i) The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State:

(ii) Subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

Distribution of surplus.

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

Customs duties of Western Australia.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that State be an Original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

Financial assistance to States.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Audit.

97. Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

Trade and commerce includes navigation and State railways.

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

Commonwealth not to give preference.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State, or any part thereof over another State or any part thereof.

Nor abridge right to use water.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Inter-State Commission.

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commisision. Parliament may forbid preferences by State.

103. The members of the Inter-State Commission— Commissioners' appointment, tenure, and remuneration.

(i) Shall be appointed by the Governor-General in Council:

(ii) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:

(iii) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

104. Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States. Saving of certain rates.

105. The Parliament may take over from the States their public debts, ~~as existing at the establishment of the Commonwealth~~ or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States. Taking over public debts of States. Altered by No. 3, 1910, s. 2.

105A. (1.) The Commonwealth may make agreements with the States with respect to the public debts of the States, including— Agreements with respect to States debts. Inserted by No. 1, 1929, s. 2.

(*a*) the taking over of such debts by the Commonwealth ;

(*b*) the management of such debts ;

(*c*) the payment of interest and the provision and management of sinking funds in respect of such debts ;

(*d*) the consolidation, renewal, conversion, and redemption of such debts ;

(*e*) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth ; and

(*f*) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(2.) The Parliament may make laws for validating any such agreement made before the commencement of this section.

(3.) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

(4.) Any such agreement may be varied or rescinded by the parties thereto.

(5.) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

(6.) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution.

CHAPTER V. THE STATES.

CHAPTER V.—THE STATES.

Saving of Constitutions.

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Saving of power of State Parliaments.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Saving of State laws.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

Inconsistency of laws.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Provisions referring to Governor.

110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

States may surrender territory.

111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

States may levy charges for inspection laws.

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State. Intoxicating liquids.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State. States may not raise forces. Taxation of property of Commonwealth or State.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts. States not to coin money.

116. The Commonwealth shall not make any laws for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. Commonwealth not to legislate in respect of religion.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State. Rights of residents in States.

118. Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State. Recognition of laws, &c., of States.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence. Protection of States from invasion and violence.

120. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision. Custody of offenders against laws of the Commonwealth.

CHAPTER VI.—NEW STATES.

CHAPTER VI. NEW STATES.

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit. New States may be admitted or established.

122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit. Government of territories.

Alteration of limits of States.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation of any State affected.

Formation of new States.

124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

CHAPTER VII.—MISCELLANEOUS.

CHAPTER VII. MISCELLANEOUS.

Seat of Government.

125. The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

Power to Her Majesty to authorize Governor-General to appoint deputies.

126. The Queen may authorize the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

Aborigines not to be counted in reckoning population.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

CHAPTER VIII.—ALTERATION OF THE CONSTITUTION.

CHAPTER VIII. ALTERATION OF CONSTITUTION.

Mode of altering the Constitution.

128. This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors of each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

SCHEDULE.

OATH.

I, *A.B.*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. So HELP ME GOD!

AFFIRMATION.

I, *A.B.*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(NOTE.—*The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.*)

APPENDIX B.

FINANCIAL AGREEMENT.

AGREEMENT made the twelfth day of December One thousand nine hundred and twenty-seven BETWEEN THE COMMONWEALTH OF AUSTRALIA (in this Agreement called the Commonwealth) of the first part, THE STATE OF NEW SOUTH WALES of the second part, THE STATE OF VICTORIA of the third part, THE STATE OF QUEENSLAND of the fourth part, THE STATE OF SOUTH AUSTRALIA of the fifth part, THE STATE OF WESTERN AUSTRALIA of the sixth part, and THE STATE OF TASMANIA of the seventh part (each of the parties of the second, third, fourth, fifth, sixth, and seventh parts being in this Agreement referred to as a State and the expression "the States" hereinafter used meaning where the context so permits or requires all of such parties).

WHEREAS with a view to making provision for the adjustment of Commonwealth and State financial relations the general principle of a draft scheme was affirmed by a Conference of Commonwealth and State Ministers in Melbourne which commenced on the sixteenth day of June One thousand nine hundred and twenty-seven;

AND WHEREAS permanent effect cannot be given to the proposals contained in the said scheme unless the Constitution of the Commonwealth is altered so as to confer on the Parliament of the Commonwealth power to make laws for carrying out or giving permanent effect to such proposals;

AND WHEREAS pending the submission to the electors of a proposed law for the alteration of the said Constitution as aforesaid and in order to obtain immediately some of the advantages which would result from united action by adoption of the said scheme the Commonwealth and the States have agreed that for the period commencing on the first day of July One thousand nine hundred and twenty-seven and ending on the thirtieth day of June One thousand nine hundred and twenty-nine certain of the proposed provisions of the said scheme shall be temporarily adopted:

NOW THIS AGREEMENT WITNESSETH:

PART I.

1. This Agreement shall have no force or effect and shall not be binding on any party unless and until it is approved by the Parliaments of the Commonwealth and of the States.

2. Definitions.

In this Agreement—

"*Net Public debt of a State existing on* 30*th June*, 1927," means in respect of each State the amount of debt set forth hereunder opposite to the name of that State, viz. :—

	£
New South Wales	234,088,501
Victoria	136,949,942
Queensland	101,977,855
South Australia	84,834,364
Western Australia	61,060,675
Tasmania	22,434,060
	£641,345,397

The said amount of the net public debt of each State includes the debts of that State secured by—

(i) Inscribed Stock, including Local Inscribed Stock and Government Inscribed Stock ;
(ii) Instalment Stock ;
(iii) Registered Stock ;
(iv) Funded Stock ;
(v) Stock payable to bearer ;
(vi) Bonds, including registered bonds ;
(vii) Debentures, including registered debentures and instalment debentures ;
(viii) Treasury Bills not repayable within twelve months from the date of issue ; or
(ix) Fixed deposit receipts or special deposit receipts for moneys borrowed for other than temporary purposes ; issued or created by the State or by or on behalf of a Colony the predecessor of the State in respect of moneys borrowed by the Colony or State together with debts of the State to the Commonwealth of the amount set out respectively hereunder opposite to the name of the State so far as those last mentioned debts are not included by being secured in manner aforesaid :—

	£
New South Wales	12,553,698
Victoria	23,688,269
Queensland	16,082,583
South Australia	18,446,197
Western Australia	16,739,872
Tasmania	3,948,613
	£91,459,232

after deducting therefrom the amount for which the Commonwealth by this Agreement assumes liability under Part III., Clause 4, of this Agreement and the amount of any moneys or securities standing to the credit of a sinking fund, redemption fund, or a fund of a like nature of the State as on

the 30th June, 1927, and does not include any moneys raised by the State by way of overdraft, fixed deposit, or special deposit for temporary purposes only.

The said sum of £234,088,501 (being the amount of the debt of New South Wales abovementioned) comprises the debts referred to in, and has been computed in the manner shown in, the statement signed by representatives of the Commonwealth and of New South Wales.

"*Gross Public Debt of a State existing on 30th June*, 1927," means in respect of each State the amount of debt set forth hereunder opposite to the name of that State, viz. :—

	£
New South Wales	239,441,363
Victoria	144,844,530
Queensland	105,259,916
South Australia	87,614,005
Western Australia	70,705,913
Tasmania	24,254,688
	£672,120,415

The said amount of the gross public debt of each State includes the net public debt of that State together with the amount for which the Commonwealth by this Agreement assumes liability under Part III., Clause (4), of this Agreement and the amount of any moneys or securities standing to the credit of any sinking fund redemption fund or fund of a like nature of the State as on 30th June, 1927.

"*Transferred Properties*" means the properties mentioned or specified in the Schedule of Transferred Properties signed by representatives of the Commonwealth and the States as revised to the 30th June, 1927, being properties which became vested in the Commonwealth pursuant to Section 85 (i) of the Constitution of the Commonwealth.

"*The Loan Council*" means the Australian Loan Council created in pursuance of this Agreement.

"*Bondholder*" means an owner of any—

(i) Inscribed Stock, including Local Inscribed Stock and Government Inscribed Stock ;
(ii) Instalment Stock ;
(iii) Registered Stock ;
(iv) Funded Stock ;
(v) Stock payable to bearer ;
(vi) Bonds, including registered bonds ;
(vii) Debentures including registered debentures and instalment debentures ;
(viii) Treasury Bills not repayable within twelve months from the date of issue or
(ix) Fixed deposit receipts or special deposit receipts for moneys borrowed for other than temporary purposes issued or created by a State or by or on behalf of a Colony the predecessor of the State in respect of borrowed moneys but does not include the Commonwealth.

3. Australian Loan Council.

(a) There shall be an Australian Loan Council, which shall consist of one Minister of State of the Commonwealth to be appointed in writing from time to time by the Prime Minister of the Commonwealth to represent the Commonwealth, and one Minister of State of each State to be appointed in writing from time to time by the Premier of that State to represent that State. Provided that, if in the opinion of the Prime Minister or of any Premier of a State, special circumstances exist at any time which make it desirable so to do, a person who is not a Minister may instead of a Minister be appointed by the Prime Minister or the Premier as the case may be to represent the Commonwealth or a State as a member of the Loan Council. The name of each person appointed to represent a State shall be notified in writing by the Premier of that State to the Prime Minister.

(b) The member representing the Commonwealth on the Loan Council shall hold office during the pleasure of the Prime Minister of the Commonwealth and a member representing a State shall hold office during the pleasure of the Premier of the State which the member was appointed to represent.

(c) A decision in which all the members for the time being of the Loan Council concur shall be a unanimous decision of the Loan Council notwithstanding any vacancy then existing in its membership.

(d) A meeting of the Loan Council may at any time be convened by the member representing the Commonwealth, and shall be so convened upon the request of at least three members representing States.

(e) A majority of the members of the Loan Councll shall constitute a quorum of the Loan Council for the exercise of its powers at any meeting. Provided that—

- (i) a member may at any time appoint in writing a deputy to act in his absence; and any deputy so appointed may in the absence of the member exercise all the powers and functions of the member and his presence shall be deemed the presence of the member; and
- (ii) an absent member who has not appointed a deputy may vote by letter or by telegram, and in such case that member shall be counted as being present in relation only to the questions on which he has voted.

(f) The Loan Council may make rules of procedure including rules relating to places, times, and notices of meetings, and conduct of business at meetings, and from time to time may alter such rules.

(g) The Commonwealth and each State will from time to time while Part II. of this Agreement is in force, and while Part III. of this Agreement is in force, submit to the Loan Council a programme setting forth the amount it desires to raise by loans for each financial year for purposes other than the conversion, renewal or redemption of existing loans or temporary purposes. Each programme shall state the estimated total amount of such loan expenditure for the year, and the estimated amount of repayments which will be available towards meeting that expenditure. Any revenue deficit to be funded shall be included in such loan programme, and the amount of such deficit shall be set out. Loans for Defence purposes approved by the Parliament of the Commonwealth shall not be included in the Commonwealth's loan programme or be otherwise subject to this Agreement.

(*h*) If the Loan Council decides that the total amount of the loan programme for the year cannot be borrowed at reasonable rates and conditions it shall decide the amount to be borrowed for the year, and may by unanimous decision allocate such amount between the Commonwealth and the States.

(*i*) If the members of the Loan Council fail to arrive at a unanimous decision under the last preceding sub-clause allocating the amount to be borrowed for any year, the amount to be borrowed for that year shall be allocated as follows:—

(i) The Commonwealth shall, if it so desires, be entitled to have one-fifth or any less proportion of such amount allocated to the Commonwealth; and

(ii) Each State shall be entitled to have allocated to it a sum (being a portion of the balance of such amount) bearing to the balance of such amount the same proportion which the net loan expenditure of that State in the preceding five years bears to the net loan expenditure of all the States during the same period. Provided that any State may, if it so desires, have allocated to it a sum less than the sum to which it is entitled under this sub-clause or no sum, and that when a less sum or no sum has been allocated to any State or States in manner aforesaid the amount then remaining available for allocation shall be allocated to the other States in the proportion which the net loan expenditure of each of such other States in the preceding five years bears to the net loan expenditure of all such other States during the same period. For the purposes of this sub-clause net loan expenditure does not include expenditure for the conversion, renewal, or redemption of loans, but means the gross other loan expenditure of a State less any amounts of such expenditure repaid to the State other than moneys repaid to the State in manner stated in Part II., clause 4 (*e*), or Part III., clause 3 (*i*), of this Agreement.

(*j*) If the total amount to be borrowed as aforesaid for any year is to be borrowed by means of more than one loan the Loan Council may by unanimous decision apportion between the Commonwealth and the States the amount to be borrowed by each such loan other than the loan by means of which the balance of the total amount to be borrowed as aforesaid for the year is borrowed.

(*k*) If the members of the Loan Council fail to arrive at a unanimous decision under the last preceding sub-clause apportioning the amount to be borrowed as aforesaid by any loan the amount to be borrowed by that loan shall be apportioned between the Commonwealth and the States in proportion to the amount then to be borrowed as aforesaid for the Commonwealth and for each State for the year.

(*l*) The Commonwealth and each State will also from time to time, while Part II., of this Agreement is in force and while Part III. of this Agreement is in force, submit to the Loan Council a statement setting out the amount it requires for each financial year for the conversion, renewal or redemption of existing loans.

(*m*) If the members of the Loan Council fail to arrive at a unanimous decision on any matter other than the matters referred to in sub-clauses (*h*) and (*j*) of clause 3 and sub-clause (*b*) of clause 4 of this part of this Agreement the matter shall be determined by a majority of votes of the members.

On every question for decision by the Loan Council the member representing the Commonwealth shall have two votes and a casting vote, and each member representing a State shall have one vote.

(*n*) A decision of the Loan Council in respect of a matter which the Loan Council is by this Agreement empowered to decide shall be final and binding on all parties to this Agreement.

(*o*) In this clause the expressions "Prime Minister" and "Premier" include the persons for the time being respectively acting as such.

4. Future Borrowings of Commonwealth and States.

(*a*) Except in cases where the Loan Council has decided under sub-clause (*b*) of this clause that moneys shall be borrowed by a State, the Commonwealth, while Part II. or Part III. of this Agreement is in force, shall, subject to the decisions of the Loan Council and subject also to Clauses 5 and 6 of this Part of this Agreement, arrange for all borrowings for or on behalf of the Commonwealth or any State, and for all conversions, renewals, redemptions, and consolidations of the Public Debts of the Commonwealth and of the States.

(*b*) If at any time the Loan Council by unanimous decision so decides, a State may in accordance with the terms of the decision borrow moneys outside Australia in the name of the State, and issue securities for the moneys so borrowed. The Commonwealth shall guarantee that the State will perform all its obligations to bondholders in respect of the moneys so borrowed. For all the purposes of this Agreement, including the making of sinking fund contributions, the moneys so borrowed shall be deemed to be moneys borrowed by the Commonwealth for and on behalf of this State.

(*c*) If any State after the 30th June, 1927, and before this Agreement has been approved by the Parliaments of the Commonwealth and of the States, has borrowed moneys in the name of the State and issued securities for the moneys so borrowed, such moneys shall for all the purposes of this Agreement, including the making of sinking fund contributions, be deemed to be moneys borrowed by the Commonwealth for and on behalf of that State.

(*d*) While Part II. or Part III. of this Agreement is in force, moneys shall not be borrowed by the Commonwealth or any State otherwise than in accordance with this Agreement.

5. Borrowing by States.

For any purpose (including the redemption of securities given or issued at any time for moneys previously borrowed or used in manner stated in this clause) a State may, while Part II. or Part III. of this Agreement is in force:—

(*a*) Subject to any maximum limits decided upon by the Loan Council from time to time for interest, brokerage, discount and other charges, borrow moneys within the State from authorities, bodies, funds or institutions (including Savings Banks) constituted or established under Commonwealth or State law or practice and from the public by counter sales of securities, and

(*b*) use any public moneys of the State which are available under the laws of the State.

Any securities that are issued for moneys so borrowed or used shall be Commonwealth securities, to be provided by the Commonwealth upon terms approved by the Loan Council.

Where any such borrowing or use is solely for temporary purposes, the provisions of this Agreement, other than this clause, shall not apply.

Where any such borrowing or use is not solely for temporary purposes, and Commonwealth securities are issued in respect thereof, the moneys borrowed or used shall be deemed to be moneys borrowed by the Commonwealth for and on behalf of the State, and may be retained by the State. A State may convert securities given or issued at any time by that State for moneys previously borrowed or used in manner stated in this clause. New securities issued on any such conversion shall be Commonwealth securities to be provided by the Commonwealth upon terms approved by the Loan Council. The amount for which such new securities are issued shall be deemed to be moneys borrowed by the Commonwealth for and on behalf of the State.

If the moneys deemed under this clause to be moneys borrowed by the Commonwealth on behalf of a State, together with the amounts raised by the Commonwealth for and on behalf of the State exceed the total amount of loan moneys decided upon by the Loan Council as the moneys to be raised for and on behalf of the State for the financial year in which the money is deemed to be borrowed, the excess shall, unless the Loan Council otherwise decides, be deemed to be moneys received by the State in the following year on account of its loan programme for that year.

For the purposes of this clause counter sales of securities shall be deemed to mean sales of securities made at the offices of the State Treasury, and at such other places as may be decided upon by the Loan Council.

The Commonwealth shall not be under any obligation to make sinking fund contributions in respect of moneys borrowed or used pursuant to this clause to meet a revenue deficit of a State, but the provisions of Clause 4 (*d*) of Part II., and of Clause 3 (*j*) of Part III. of this Agreement shall apply respectively to all moneys borrowed or used for that purpose.

Except in cases where the Loan Council has otherwise decided under sub-clause (*b*) of clause 4 of Part I. of this Agreement a State shall not have the right to invite loan subscriptions by the issue of a public prospectus.

Notwithstanding anything contained in this Agreement, any State may use for temporary purposes any public moneys of the State which are available under the laws of the State, or may, subject to maximum limits (if any) decided upon by the Loan Council from time to time for interest, brokerage, discount, and other charges, borrow money for temporary purposes by way of overdraft, or fixed, special, or other deposit, and the provisions of this Agreement other than this paragraph shall not apply to such moneys.

6. Borrowing by Commonwealth.

For any purpose (including the redemption of securities given or issued at any time for moneys previously borrowed or used in manner stated in this clause) the Commonwealth may—while Part II. or Part III. of this Agreement is in force—

(*a*) Subject to any maximum limits decided upon by the Loan Council from time to time for interest, brokerage, discount and other charges, borrow moneys within the Commonwealth from authorities, bodies, funds or institutions (including Savings

Banks) constituted or established under Commonwealth or State law or practice and from the public by counter sales of securities, and

(b) use any public moneys of the Commonwealth which are available under the laws of the Commonwealth.

Any securities that are issued for moneys so borrowed or used shall be Commonwealth securities, to be provided by the Commonwealth upon terms approved by the Loan Council.

Where any such borrowing or use is solely for temporary purposes, the provisions of this Agreement, other than this clause, shall not apply.

Where any such borrowing or use is not solely for temporary purposes, and Commonwealth securities are issued in respect thereof, the moneys borrowed or used may be retained by the Commonwealth. The Commonwealth may convert securities given or issued at any time by the Commonwealth for moneys previously borrowed or used in manner stated in this clause. New securities issued on any such conversion shall be Commonwealth securities to be provided by the Commonwealth upon terms approved by the Loan Council.

If the moneys so borrowed or used are not borrowed or used solely for temporary purposes and Commonwealth securities are issued in respect thereof, and such moneys, together with other moneys borrowed by the Commonwealth for and on behalf of the Commonwealth as part of the total amount of loan moneys decided upon by the Loan Council as the moneys to be raised for and on behalf of the Commonwealth for the financial year in which the securities are issued, exceed such total amount the excess shall unless the Loan Council otherwise decides be deemed to be moneys received by the Commonwealth in the following year on account of its loan programme for that year.

For the purposes of this clause counter sales of securities shall be deemed to mean sales of securities made at the offices of the Commonwealth Treasury, and at such other places as may be decided upon by the Loan Council.

Notwithstanding anything contained in this Agreement, the Commonwealth may use for temporary purposes any public moneys of the Commonwealth which are available under the laws of the Commonwealth or may, subject to maximum limits (if any) decided upon by the Loan Council from time to time for interest, brokerage, discount, and other charges, borrow money for temporary purposes by way of overdraft, or fixed, special or other deposit, and the provisions of this Agreement other than this paragraph shall not apply to such moneys.

7. Payment of Interest and Sinking Funds.

In the event of Part III. of this Agreement not coming into force each State shall in respect of all moneys borrowed by the Commonwealth for and on behalf of that State during the period commencing on the 1st July, 1927, and ending on the 30th June, 1929—

(a) pay to the Commonwealth interest at the full rate of interest payable by the Commonwealth in respect of the loan by which such moneys were borrowed or such other rate of interest as may be payable by that State to the Commonwealth under any agreement made or to be made between the Commonwealth and that State in respect of such moneys. Such interest shall be payable for the full term of that loan and be paid to the Commonwealth on the respective days upon which interest is payable by the Commonwealth in respect of that loan; and

(*b*) make sinking fund contributions to the National Debt Commission in respect of the loan by which such moneys were borrowed at the full rate, and for the portion unexpired on the 30th June, 1929, of the full period, provided for in the conditions under which the public were invited to subscribe to that loan ; and

(*c*) pay to the Commonwealth when the loan matures an amount which (together with the sinking fund contributions made by the Commonwealth and the State in respect of that loan and the accumulations of such contributions) will be sufficient to provide for the redemption of that loan. For the purposes of this sub-clause such contributions shall be deemed to accumulate at the rate of 4½ per centum per annum compounded.

PART II.

1. This part of this Agreement shall be in force only during and in respect for the period of two years, commencing on 1st July, 1927, and ending on 30th June, 1929.

2. Contribution by Commonwealth to Interest.

The Commonwealth will in each of the said two years pay to each State by equal monthly instalments the amount set out opposite to the name of that State as shown hereunder :—

	£
New South Wales	2,917,411
Victoria	2,127,159
Queensland	1,096,235
South Australia	703,816
Western Australia	473,432
Tasmania	266,859
	£7,584,912

Each State shall apply the amount so paid to it towards payment of interest due by that State on the Public Debt of that State. All amounts paid by the Commonwealth to a State in pursuance of section 6 of the *States Grants Act* 1927, of the Commonwealth shall be deemed to be payments to that State under this clause.

3. Transferred Properties.

The Commonwealth will in each of the said two years pay to each State interest at the rate of 5 per centum per annum on the agreed value of transferred properties in the State, such value being in the case of each State as follows :—

	£
New South Wales	4,788,005
Victoria	2,302,862
Queensland	1,560,639
South Australia	1,035,631
Western Australia	736,432
Tasmania	500,754
Total	£10,924,323

4. Sinking Funds.

(*a*) In each of the said two years the Commonwealth will pay from revenue a sinking fund contribution at the rate of 2s. 6d. per annum for each £100 of the net Public Debts of the States existing on 30th June, 1927, and each State (other than the State of New South Wales) will pay from revenue a sinking fund contribution at the rate of 5s. per annum for each £100 of the net public debt of that State existing on 30th June, 1927. The State of New South Wales will in the financial year commencing 1st July, 1928, pay from revenue a sinking fund contribution at the rate of 5s. for each £100 of the net public debt of that State existing on 30th June, 1927.

(*b*) Where in respect of any debt included in the gross public debt of a State existing on 30th June, 1927, there is under laws or contracts existing at that date an obligation to provide a sinking fund at a rate in excess of 7s. 6d. per annum for each £100, any amount to be so provided in excess of the rate of 7s. 6d. per annum for each £100 shall be provided out of the National Debt Sinking Fund established under the laws of the Commonwealth. Provided that if any law imposing such an obligation is repealed or is amended so as to reduce the rate of sinking fund to be provided, the only amount (if any) to be provided out of the National Debt Sinking Fund pursuant to this sub-clause in respect of that debt shall, as from the date of such repeal or amendment, be the amount (if any) by which the reduced rate of sinking fund for the time being exceeds 7s. 6d. per annum for each £100.

(*c*) In respect of each loan raised after the 30th June, 1927, either by a State or by the Commonwealth for and on behalf of a State (other than a loan raised for the conversion, renewal, or redemption of a loan or for temporary purposes) the Commonwealth and that State shall, subject to the next succeeding sub-clause as from the date of the raising of that loan, each pay from revenue a sinking fund contribution at the rate of five shillings (5s.) per annum for each £100 of the amount of such loan. Provided, however, that the liability of the State of New South Wales to make sinking fund contributions under this sub-clause shall commence on the 1st July, 1928. The provisions of this sub-clause apply to a loan raised after the 30th June, 1927, to meet a revenue deficit which accrued on or before that date.

(*d*) In respect of any loan raised after 30th June, 1927, by a State or by the Commonwealth for and on behalf of a State to meet a revenue deficit accruing after that date no sinking fund contribution shall be payable by the Commonwealth, but that State shall pay from revenue a sinking fund contribution at a rate of not less than 4 per centum per annum on the amount of that loan.

(*e*) Where loan moneys have been advanced by a State under terms providing for the repayment of such moneys, the State shall as and when such moneys are repaid pay such moneys either to the State Loan Fund or to the account or fund from which such moneys were advanced, or to the sinking fund hereinafter mentioned, and shall, in addition, make from revenue its sinking fund contributions in respect of the loan or loans from which the moneys so advanced were provided.

Provided that when loan moneys have been advanced by a State to a Public or Local Authority or body constituted by the State or under the laws of the State and the Authority or body repays such moneys out of its revenue the State may out of moneys so repaid make its sinking fund contributions in respect of the loan moneys so advanced.

(*f*) All sinking fund contributions to be made in pursuance of this Part of this Agreement shall be paid to the National Debt Commission constituted under the *National Debt Sinking Fund Act* 1923–25, of the Commonwealth (herein called the National Debt Commission) as follows :—

(i) as regards the net public debt of a State existing on 30th June, 1927—by half-yearly instalments on 30th September and 31st March in each financial year, or on such other dates as may be agreed between the Commonwealth and the State ;

(ii) as regards loans raised after 30th June, 1927—by equal instalments on the dates on which interest on such loans is payable or on such other dates as may be agreed upon between the Commonwealth and the State concerned.

(*g*) Where the conditions relating to sinking funds, redemption funds and funds of a like nature require payments to be made to trustees, the National Debt Commission will either directly or through any State concerned, make the necessary payments to those trustees.

(*h*) The sinking fund contributions made under this Part of this Agreement in respect of the Public Debt of a State (other than contribution) paid or to be paid to trustees under the last preceding sub-clause hereof shall so far as the same will suffice be applied in the repurchase or redemption of the Public Debt of that State and in the event of the proposed law for the alteration of the Constitution referred to in Part IV. of this Agreement not becoming law and of this Agreement not being validated thereunder, on or before the 30th June, 1929, all State securities repurchased or redeemed as aforesaid shall be cancelled with the exception of securities the market value of which represents the amount of money provided in excess of the rate of 7s. 6d. per annum for each £100 under paragraph (*b*) of this clause, which latter securities shall be retained by and belong to the National Debt Commission.

PART III.

This Part of this Agreement shall not come into force or be binding upon any party hereto unless before the 1st July, 1929, the Constitution of the Commonwealth has been altered in accordance with the proposals referred to in Part IV. of this Agreement and a law of the Parliament of the Commonwealth has been made thereunder validating this Agreement, but shall come into full force and effect if and when before the said date the Constitution is so altered and this Agreement is so validated.

When this Part of this Agreement comes into force every matter or thing done and payment made under or in pursuance of Part II. of this Agreement shall be deemed, so far as is practicable, to have been done or made under this Part of this Agreement to the same extent as if this Part had then in fact been in force, and all necessary adjustments shall be made in respect of moneys so paid in order to ensure that no party hereto shall be liable for or make double payments in respect of the same matter.

PERMANENT PROVISIONS.

1. Taking over States' Public Debts.

Subject to the provisions of this Part of this Agreement the Commonwealth will take over on the 1st July, 1929 :—

(i) the balance then unpaid of the gross public debt of each State existing on 30th June, 1927 ; and

(ii) all other debts of each State existing on the 1st July, 1929, for moneys borrowed by that State which by this Agreement are deemed to be moneys borrowed by the Commonwealth for and on behalf of that State—

and will in respect of the debts so taken over assume as between the Commonwealth and the States the liabilities of the States to bondholders.

2. Payments of Interest.

(*a*) Subject to this clause the Commonwealth will pay to bondholders from time to time interest payable on the Public Debts of the States taken over by the Commonwealth as aforesaid other than debts due by the States to the Commonwealth.

(*b*) The Commonwealth will in each year during the period of 58 years, commencing on 1st July, 1927, provide by equal monthly instalments the following amounts in respect of each State as shown hereunder towards the interest payable by that State :—

	£
New South Wales	2,917,411
Victoria	2,127,159
Queensland	1,096,235
South Australia	703,816
Western Australia	473,432
Tasmania	266,859
	£7,584,912

(*c*) Each State shall in each year during the same period of 58 years pay to the Commonwealth the excess over the amounts to be provided by the Commonwealth under the last preceding sub-clause necessary to make up as they fall due the interest charges falling due in that year on the public debt of that State taken over by the Commonwealth as aforesaid and then unpaid, and on any moneys borrowed by the Commonwealth on behalf of that State and then unpaid, and after the expiration of the said period each State shall in each year pay to the Commonwealth, as they fall due, the whole of the interest charges on any debt then unpaid and included in the public debt of that State taken over by the Commonwealth as aforesaid, and on any moneys borrowed by the Commonwealth on behalf of that State and then unpaid.

(*d*) The method by which payments shall be made by a State under sub-clause (*c*) of this clause shall be arranged from time to time between the Commonwealth and that State.

(*e*) The rate of interest payable under sub-clause (*c*) of this clause in respect of moneys borrowed by the Commonwealth on behalf of a State shall be the full rate of interest payable by the Commonwealth in respect of the loan by which such moneys were borrowed or such other rate of interest as may be payable by the State to the Commonwealth under any Agreement made or to be made between the Commonwealth and that State in respect of such moneys and such interest shall be payable by the State for the full term of that loan.

3. Sinking Funds.

(a) A sinking fund at the rate of 7s. 6d. per annum for each £100 of the net public debts of the States existing on 30th June, 1927, shall be established in the manner hereinafter set forth.

(b) During the period of fifty-eight years commencing on the 1st July, 1927, the Commonwealth shall pay from revenue annually a sinking fund contribution at the rate of 2s. 6d. for each £100 of the net public debts of the States existing on 30th June, 1927, and each State (other than the State of New South Wales) shall in each year during the said period pay from revenue a sinking fund contribution at the rate of 5s. for each £100 of the net public debt of such State existing on 30th June, 1927. The State of New South Wales during the period of fifty-eight years commencing on the 1st July, 1928, shall in each year pay from revenue a sinking fund contribution at the rate of 5s. for each £100 of the net public debt of that State existing on 30th June, 1927.

(c) Where in respect of any debt included in the gross Public Debt of a State existing at the 30th June, 1927, there is under laws or contracts existing at that date an obligation to provide a sinking fund at a rate in excess of 7s. 6d. per annum for each £100, any amount to be so provided in excess of 7s. 6d. per annum for each £100 shall be provided out of the National Debt Sinking Fund, established under the laws of the Commonwealth. Provided that if any law imposing such an obligation is repealed or is amended so as to reduce the rate of sinking fund to be provided the only amount (if any) to be provided out of the National Debt Sinking Fund pursuant to this sub-clause in respect of that debt shall as from the date of such repeal or amendment be the amount (if any) by which the reduced rate of sinking fund for the time being exceeds 7s. 6d. per annum for each £100.

(d) When a loan is issued for the conversion, renewal, or redemption of any debt of a State included in the gross Public Debt of that State existing on 30th June, 1927, the only sinking fund contributions to be made by the Commonwealth and that State in respect of the debt so converted, renewed or redeemed shall be sinking fund contributions at the same rate and for the same period and upon the same amount as if such debt had not been converted, renewed, or redeemed.

(e) Subject to sub-clauses (h) and (j) of this clause a sinking fund at the rate of 10s. per annum for each £100 of the amount of each new loan raised by a State or by the Commonwealth for and on behalf of a State after 30th June, 1927, shall be established.

(f) Subject to sub-clauses (h) and (j) of this clause, in each year during the period of fifty-three years from the date of the raising after 30th June, 1927, of any new loan by a State or by the Commonwealth for and on behalf of a State the Commonwealth and that State shall each pay from revenue a sinking fund contribution of a sum equal to 5s. for each £100 of the amount of the new loan.

Provided that the period of fifty-three years during which the State of New South Wales shall make sinking fund contributions in respect of new loans raised in the financial year beginning on the 1st July, 1927, shall commence on the 1st July, 1928.

(g) For the purpose of the last two preceding sub-clauses a loan issued after the 30th June, 1927, to meet a revenue deficit which accrued on or before that date shall be deemed to be a new loan, but a loan issued for the

conversion, renewal, or redemption of a debt shall not be deemed to be a new loan, and where a loan is issued partly for the conversion, renewal, or redemption of a debt and partly for other purposes so much only of the loan as has been issued for other purposes shall be deemed to be a new loan.

(*h*) Where it is agreed between the Commonwealth and a State that a loan or any portion of a loan raised after 30th June, 1927, and expended or to be expended upon wasting assets should be redeemed within a shorter period than fifty-three years, the annual sinking fund contributions of the State in respect of that loan or the portion thereof shall be increased to an amount which with the sinking fund contributions of the Commonwealth in respect of that loan or the portion thereof will provide for the redemption of that loan or the portion thereof within such shorter period. All sinking fund contributions of the State in respect of that loan or the portion thereof shall cease on the expiration of the shorter period, but the Commonwealth contributions in respect of that loan shall continue for the remainder of the period of fifty-three years from the date of the raising of that loan, and during such remainder of the period the State contributions to the sinking fund in respect of other loans of that State shall be reduced by the amount of the Commonwealth contributions during that remainder of the period in respect of such redeemed loan or the portion thereof. For the purposes of this sub-clause the sinking fund contributions of the Commonwealth and the State shall be deemed to accumulate at the rate of 4½ per centum per annum compounded.

(*i*) Where loan moneys have been advanced by a State under terms providing for the repayment of such moneys the State shall as and when such moneys are repaid pay such moneys either to the State Loan Fund or to the account or fund from which such moneys were advanced, or to the sinking fund and shall in addition make from revenue its sinking fund contributions in respect of the loan or loans from which the moneys so advanced were provided.

Provided that when loan moneys have been advanced by a State to a Public or Local Authority or body constituted by the State or under the laws of the State and the Authority or body repays such moneys out of its revenue the State may out of moneys so repaid make its sinking fund contributions in respect of the loan moneys so advanced.

(*j*) In respect of any loan raised after the 30th June, 1927, by a State or by the Commonwealth for and on behalf of a State to meet a revenue deficit accruing after that date no sinking fund contribution shall be payable by the Commonwealth, but that State shall for a period sufficient to provide for the redemption of that loan pay from revenue in each year during such period a sinking fund contribution at a rate of not less than 4 per centum per annum of the amount of that loan. For the purposes of this sub-clause the sinking fund contributions of the State shall be deemed to accumulate at the rate of 4½ per centum per annum compounded.

(*k*) All sinking fund contributions to be made in pursuance of this part of this Agreement shall be debts payable to the National Debt Commission as follows :—

(i) As regards the net public debt of a State existing on 30th June, 1927—by half-yearly instalments on 30th September and 31st March in each financial year or on such other dates as may be agreed between the Commonwealth and that State.

(ii) As regards loans raised after 30th June, 1927 — by equal instalments on the dates on which interest on such loans is payable or on such other dates as may be agreed upon between the Commonwealth and the State concerned.

(*l*) Subject to the next succeeding sub-clause all moneys and securities standing to the credit of sinking funds, redemption funds and funds of a like nature of a State existing on 30th June, 1929, shall forthwith be transferred by the States to the National Debt Commission. Nothing in this sub-clause contained shall be deemed to limit the power of a State to cancel before 30th June, 1929, any such securities.

(*m*) Where the conditions relating to sinking funds, redemption funds, and funds of a like nature as aforesaid held by a State on trust or by trustees under statutory or contractual obligations preclude the transfer of those funds to the National Debt Commission, such funds shall remain under the control of the State or those trustees, and the National Debt Commission will either directly or through the State concerned make all future payments to the State or to those trustees from the sinking fund.

(*n*) The sinking funds to be established under this Agreement shall be controlled by the National Debt Commission. The National Debt Commission may arrange with any State to act as its agent in connexion with payments due to bondholders.

(*o*) Sinking Fund contributions made under this Agreement in respect of the debts of a State and funds of that State transferred to the National Debt Commission under sub-clause (*l*) of this clause will not be accumulated, but (subject to sub-clauses (*m*) and (*p*) of this clause) will be applied to the redemption of the public debts of that State and of loans raised by the Commonwealth for and on behalf of that State, or to the purchase of securities issued in respect thereof.

(*p*) If at any time it is deemed inexpedient by the National Debt Commission to apply sinking funds in the manner set forth in sub-clause (*o*) of this clause, such funds may be temporarily invested in any securities in which the National Debt Commission is from time to time by law authorized to invest moneys.

(*q*) When a security issued in respect of a public debt of a State or of a loan raised by the Commonwealth for and on behalf of a State is repurchased or redeemed by the National Debt Commission such security shall be cancelled—

(i) if a repurchased security—on the last day of September, December, March, or June next ensuing after the date of repurchase, or on the date of maturity of the security whichever shall first occur; and

(ii) if a redeemed security—on the date of redemption.

In addition to the sinking fund contributions otherwise payable in respect of that debt or loan the State concerned shall—

(i) as from the date of cancellation of each security and for the full period during which the said sinking fund contributions are payable make from revenue a further sinking fund contribution at the rate of 4½ per centum per annum of the face value of the cancelled security; and

(ii) also pay to the National Debt Commission interest on the face value of each repurchased security at the rate provided by the security from the last date preceding the repurchase upon which interest was payable under the terms of the security up to the date of cancellation of the security.

4. Transferred Properties.

It is agreed that all questions between the Commonwealth and the States relating to State properties transferred to the Commonwealth or acquired by the Commonwealth under section 85 of the Constitution shall be settled as follows :—

The States will as from 1st July, 1929, and as between the Commonwealth and the States be completely free and discharged from all liability whether in respect of principal, interest or sinking fund, or otherwise, which liability shall be assumed by the Commonwealth in respect of so much of the public debts of the States bearing interest at the rate of 5 per centum per annum, taken over by the Commonwealth as aforesaid as amounts to the agreed value of transferred properties, namely, £10,924,323, apportioned to the several States as follows :—

	£
New South Wales	4,788,005
Victoria	2,302,862
Queensland	1,560,639
South Australia	1,035,631
Western Australia	736,432
Tasmania	500,754
Total	£10,924,323

The particular portion of the public debt of each State in respect of which the States shall become free and discharged from liability shall be determined by the Commonwealth.

Each State will issue to the Commonwealth freehold titles (or, if the laws of any State do not permit of the issue of freehold titles, then titles as near to freehold as the laws of that State will permit) for transferred properties consisting of land or interests in land in that State, and all liability of the Commonwealth to the State in respect of transferred properties shall as from the 1st July, 1929, be extinguished.

The provisions of clauses 2 and 3 of this Part of this Agreement shall not apply to the said amount of £10,924,323.

PART IV.—MISCELLANEOUS.

1. Expenses of Loan Flotation.

Each State shall repay to the Commonwealth all expenses incurred or payments made by the Commonwealth in the performance of this Agreement in relation to the State including the following expenses and payments :—

(i) Loan flotation charges ;

(ii) Management charges ;

(iii) Stamp duties on transfer of securities ;

(iv) Commission on payment of interest ;

(v) Expenses incurred in the conversion renewal redemption or consolidation of loans ;

(vi) Exchange on transference of moneys.

Unless it is otherwise agreed between the Commonwealth and a State the Commonwealth will not do anything in connexion with a loan of that State existing on the 30th June, 1927, or raised thereafter pursuant to this Agreement which if done by that State would be a breach of any now existing agreement by that State with any Bank.

A certificate by the Auditor-General of the Commonwealth stating the amount to be repaid by a State to the Commonwealth and the matter in respect of which the repayment is to be made shall in the event of a dispute be conclusive as to the amount and matter stated.

2. Alteration of the Constitution.

The Commonwealth will take the necessary action to submit to the Parliament of the Commonwealth and to the electors proposals for the alteration of the Constitution of the Commonwealth in the following form :—

" 105A. (1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including—

(*a*) the taking over of such debts by the Commonwealth ;

(*b*) the management of such debts ;

(*c*) the payment of interest and the provision and management of sinking funds in respect of such debts ;

(*d*) the consolidation, renewal, conversion, and redemption of such debts ;

(*e*) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth ; and

(*f*) the borrowing of money by the States or by the Commonwealth or by the Commonwealth for the States.

(2) The Parliament may make laws for validating any such agreement made before the commencement of this section.

(3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.

(4) Any such agreement may be varied or rescinded by the parties thereto.

(5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto, notwithstanding anything contained in this Constitution or the constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

(6) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section 105 of this Constitution."

3. Indemnity.

Each State agrees with the Commonwealth that it will by the faithful performance of its obligations under this Agreement indemnify the Commonwealth against all liabilities whatsoever in respect of the public debt of that State taken over by the Commonwealth as aforesaid (other than the liabilities of the Commonwealth under this Agreement to pay interest and to make sinking fund contributions and under clause 4 of Part III. of this Agreement), and in respect of all loans of that State in respect of which this Agreement provides that sinking fund contributions shall be made.

4. ACCOUNTS.

Separate accounts shall be kept by the Commonwealth for each State in respect of Debt, Interest, and Sinking Funds.

IN WITNESS whereof the Prime Minister of the Commonwealth of Australia and the Premiers of each of the States of New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania have signed this Agreement respectively for and on behalf of the Commonwealth of Australia and of the said States.

Signed by the Prime Minister of the Commonwealth of Australia for and on behalf of the said Commonwealth in the presence of— EARLE PAGE. } S. M. BRUCE.

Signed by the Premier of the State of New South Wales for and on behalf of the said State in the presence of— B. S. STEVENS. } T. R. BAVIN.

Signed by the Premier of the State of Victoria for and on behalf of the said State in the presence of— H. A. PITT. } E. J. HOGAN.

Signed by the Premier of the State of Queensland for and on behalf of the said State in the presence of— J. MULLAN. } W. McCORMACK.

Signed by the Premier of the State of South Australia for and on behalf of the said State in the presence of— H. TASSIE. } R. L. BUTLER.

Signed by the Premier of the State of Western Australia for and on behalf of the said State in the presence of— GEO. W. SIMPSON. } P. COLLIER.

Signed by the Premier of the State of Tasmania for and on behalf of the said State in the presence of— J. ALLAN GUY. } J. A. LYONS.

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APPENDIX C.

THE REPORT OF THE INTER-IMPERIAL RELATIONS COMMITTEE, 1926.—EXTRACTS.

II. Status of Great Britain and the Dominions.

The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution; while, considered as a whole, it defies classification and bears no real resemblance to any other political organization which now exists or has ever yet been tried.

There is, however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development—we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*

A foreigner endeavouring to understand the true character of the British Empire by the aid of this formula alone would be tempted to think that it was devised rather to make mutual interference impossible than to make mutual co-operation easy.

Such a criticism, however, completely ignores the historic situation. The rapid evolution of the Oversea Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions. The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy; and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.

But no account, however accurate, of the negative relations in which Great Britain and the Dominions stand to each other can do more than express a portion of the truth. The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security, and progress are among its objects. Aspects of all these great themes have been discussed at the present Conference; excellent results have been thereby obtained. And though every Dominion is now, and must always remain, the sole judge of the nature and extent of its co-operation, no common cause will, in our opinion, be thereby imperilled.

Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our inter-Imperial relations. But the principles of equality and similarity, appropriate to status, do

not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery —machinery which can, from time to time, be adapted to the changing circumstances of the world. This subject also has occupied our attention. The rest of this report will show how we have endeavoured not only to state political theory but to apply it to our common needs. . . .

V. Relations with Foreign Countries.

From questions specially concerning the relations of the various parts of the British Empire with one another, we naturally turned to those affecting their relations with foreign countries. In the latter sphere, a beginning had been made towards making clear those relations by the Resolution of the Imperial Conference of 1923 on the subject of the negotiation, signature, and ratification of treaties. But it seemed desirable to examine the working of that Resolution during the past three years and also to consider whether the principles laid down with regard to Treaties could not be applied with advantage in a wider sphere.

(a) Procedure in Relation to Treaties.

We appointed a special Sub-Committee under the Chairmanship of the Minister of Justice of Canada (the Honorable E. Lapointe, K.C.) to consider the question of treaty procedure.

The Sub-Committee on whose report the following paragraphs are based, found that the Resolution of the Conference of 1923 embodied on most points useful rules for the guidance of the Governments. As they became more thoroughly understood and established, they would prove effective in practice.

Some phases of treaty procedure were examined, however, in greater detail in the light of experience in order to consider to what extent the Resolution of 1923 might with advantage be supplemented.

Negotiation.

It was agreed in 1923 that any of the Governments of the Empire contemplating the negotiation of a treaty should give due consideration to its possible effect upon other Governments and should take steps to inform Governments likely to be interested of its intention. This rule should be understood as applying to any negotiations which any Government intends to conduct, so as to leave it to the other Governments to say whether they are likely to be interested.

When a Government has received information of the intention of any other Government to conduct negotiations, it is incumbent upon it to indicate its attitude with reasonable promptitude. So long as the initiating Government receives no adverse comments, and so long as its policy involves no active obligations on the part of the other Governments, it may proceed on the assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve the other Governments in any active obligations, obtain their definite assent.

Where by the nature of the treaty it is desirable that it should be ratified on behalf of all the Governments of the Empire, the initiating Government may assume that a Government which has had full opportunity of indicating its attitude and has made no adverse comments will concur in the ratification of the treaty. In the case of a Government that prefers not to concur in the ratification of a treaty unless it has been signed by a plenipotentiary authorized to act on its behalf, it will advise the appointment of a plenipotentiary so to act. . . .

In the case of a treaty applying to only one part of the Empire it should be stated to be made by the King on behalf of that part.

The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King. In this connexion it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the Legal Committee of that Conference laid it down that the principle to which the foregoing sentence gives expression underlies all international conventions.

In the case of some international agreements the Governments of different parts of the Empire may be willing to apply between themselves some of the provisions as an administrative measure. In this case they should state the extent to which and the terms on which such provisions are to apply. Where international agreements are to be applied between different parts of the Empire, the form of a treaty between Heads of States should be avoided.

Full Powers.

The plenipotentiaries for the various British units should have full powers, issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire for which they are to sign. It will frequently be found convenient, particularly where there are some parts of the Empire on which it is not contemplated that active obligations will be imposed, but where the position of the British subjects belonging to these parts will be affected, for such Government to advise the issue of full powers on their behalf to the plenipotentiary appointed to act on behalf of the Government or Governments mainly concerned. In other cases provision might be made for accession by other parts of the Empire at a later date.

Signature.

In the cases where the names of countries are appended to the signatures in a treaty, the different parts of the Empire should be designated in the same manner as is proposed in regard to the list of plenipotentiaries in the preamble to the treaty. The signatures of the plenipotentiaries of the various parts of the Empire should be grouped together in the same order as is proposed above.

The signature of a treaty on behalf of a part of the Empire should cover territories for which a mandate has been given to that part of the Empire, unless the contrary is stated at the time of the signature.

Coming into Force of Multilateral Treaties.

In general, treaties contain a ratification clause and a provision that the treaty will come into force on the deposit of a certain number of ratifications. The question has sometimes arisen in connexion with treaties negotiated under the auspices of the League whether, for the purpose of making up the number of ratifications necessary to bring the treaty into force, ratifications on behalf of different parts of the Empire which are separate Members of the League should be counted as separate ratifications. In order to avoid any difficulty in future, it is recommended that, when it is thought necessary that a treaty should contain a clause of this character, it should take the form of a provision that the treaty should come into force when it has been ratified on behalf of so many separate Members of the League.

We think that some convenient opportunity should be taken of explaining to the other Members of the League the changes which it is desired to make in the form of treaties and the reasons for which they are desired. We would also recommend that the various Governments of the Empire should make it an instruction to their representatives at International Conferences to be held in future that they should use their best endeavours to secure that effect is given to the recommendations contained in the foregoing paragraphs.

(b) Representation at International Conferences.

We also studied, in the light of the Resolution of the Imperial Conference of 1923 to which reference has already been made, the question of the representation of the different parts of the Empire at International Conferences. The conclusions which we reached may be summarized as follows:—

1. No difficulty arises as regards representation at conferences convened by, or under the auspices of, the League of Nations. In the case of such conferences all members of the League are invited, and if they attend are represented separately by separate delegations. Co-operation is ensured by the application of paragraph I.i. (*c*) of the Treaty Resolution of 1923.

2. As regards international conferences summoned by foreign Governments, no rule of universal application can be laid down, since the nature of the representation must, in part, depend on the form of invitation issued by the convening Government.

(*a*) In conferences of a technical character, it is usual and always desirable that the different parts of the Empire should (if they wish to participate) be represented separately by separate delegations, and where necessary efforts should be made to secure invitations which will render such representation possible.

(*b*) Conferences of a political character called by a foreign Government must be considered on the special circumstances of each individual case.

It is for each part of the Empire to decide whether its particular interests are so involved, especially having regard to the active obligations likely to be imposed by any resulting treaty, that it desires to be represented at the conference, or whether it is content to leave the negotiation in the hands of the part or parts of the Empire more directly concerned and to accept the results.

If a Government desires to participate in the conclusion of a treaty, the method by which representation will be secured is a matter to be arranged with the other Governments of the Empire in the light of the invitation which has been received.

Where more than one part of the Empire desires to be represented, three methods of representation are possible:—

(i) By means of a common plenipotentiary or plenipotentiaries, the issue of full powers to whom should be on the advice of all parts of the Empire participating.

(ii) By a single British Empire delegation composed of separate representatives of such parts of the Empire as are participating in the conference. This was the form of representation employed at the Washington Disarmament Conference of 1921.

(iii) By separate delegations representing each part of the Empire participating in the conference. If, as a result of consultation, this third method is desired, an effort must be made to ensure that the form of invitation from the convening Government will make this method of representation possible.

Certain non-technical treaties should, from their nature, be concluded in a form which will render them binding upon all parts of the Empire, and for this purpose should be ratified with the concurrence of all the Governments. It is for each Government to decide to what extent its concurrence in the ratification will be facilitated by its participation in the conclusion of the treaty, as, for instance, by the appointment of a common plenipotentiary. Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the Governments.

(c) *General Conduct of Foreign Policy.*

We went on to examine the possibility of applying the principles underlying the Treaty Resolution of the 1923 Conference to matters arising in the conduct of foreign affairs generally. It was frankly recognized that in this sphere, as in the sphere of defence, the major share of responsibility rests now, and must for some time continue to rest, with His Majesty's Government in Great Britain. Nevertheless, practically all the Dominions are engaged to some extent, and some to a considerable extent, in the conduct of foreign relations, particularly those with foreign countries on their borders. A particular instance of this is the growing work in connexion with the relations between Canada and the United States of America, which has led to the necessity for the appointment of a Minister Plenipotentiary to represent the Canadian Government in Washington. We felt that the governing consideration underlying all discussions of this problem must be that neither Great Britain nor the Dominions could be committed to the acceptance of active obligations except with the definite assent of their own Governments. In the light of this governing consideration, the Committee agreed that the general principle expressed in relation to Treaty negotiations in section V (*a*) of this Report,

which is indeed already to a large extent in force, might usefully be adopted as a guide by the Governments concerned in future in all negotiations affecting foreign relations falling within their respective spheres.

(d) Issue of Exequaturs to Foreign Consuls in the Dominions.

A question was raised with regard to the practice regarding the issue of exequaturs to Consuls in the Dominions. The general practice hitherto, in the case of all appointments of Consuls de Carrière in any part of the British Empire, has been that the foreign Government concerned notifies His Majesty's Government in Great Britain, through the diplomatic channel, of the proposed appointment and that, provided that it is clear that the person concerned is, in fact, a Consul de Carrière, steps have been taken, without further formality, for the issue of His Majesty's exequatur. In the case of Consuls other than those de Carrière, it has been customary for some time past to consult the Dominion Government concerned before the issue of the exequatur.

The Secretary of State for Foreign Affairs informed us that His Majesty's Government in Great Britain accepted the suggestion that in future any application by a foreign Government for the issue of an exequatur to any person who was to act as Consul in a Dominion should be referred to the Dominion Government concerned for consideration and that, if the Dominion Government agreed to the issue of the exequatur, it would be sent to them for counter-signature by a Dominion Minister. Instructions to this effect had indeed already been given.

(e) Channel of Communication between Dominion Governments and Foreign Governments.

We took note of a development of special interest which had occurred since the Imperial Conference last met, viz., the appointment of a Minister Plenipotentiary to represent the interests of the Irish Free State in Washington, which was now about to be followed by the appointment of a diplomatic representative of Canada. We felt that most fruitful results could be anticipated from the co-operation of His Majesty's representatives in the United States of America, already initiated, and now further to be developed. In cases other than those where Dominion Ministers were accredited to the Heads of Foreign States, it was agreed to be very desirable that the existing diplomatic channels should continue to be used, as between the Dominion Governments and foreign Governments, in matters of general and political concern.

VI. System of Communication and Consultation.

Sessions of the Imperial Conference at which the Prime Ministers of Great Britain and of the Dominions are all to be present cannot, from the nature of things, take place very frequently. The system of communication and consultation between Conferences becomes therefore of special importance. We reviewed the position now reached in this respect with special reference to the desirability of arranging that closer personal touch should be established between Great Britain and the Dominions, and the Dominions *inter se*. Such contact alone can convey an impression of the atmosphere in which official correspondence is conducted. Development, in this respect, seems particularly

necessary in relation to matters of major importance in foreign affairs where expedition is often essential, and urgent decision necessary. A special aspect of the question of consultation which we considered was that concerning the representation of Great Britain in the Dominions. By reason of his constitutional position, as explained in section IV. (*b*) of this Report, the Governor-General is no longer the representative of His Majesty's Government in Great Britain. There is no one therefore in the Dominion capitals in a position to represent with authority the views of His Majesty's Government in Great Britain.

We summed up our conclusions in the following Resolution, which is submitted for the consideration of the Conference:—

"The Governments represented at the Imperial Conference are impressed with the desirability of developing a system of personal contact, both in London and in the Dominion capitals, to supplement the present system of inter-communication and the reciprocal supply of information on affairs requiring joint consideration.

The manner in which any new system is to be worked out is a matter for consideration and settlement between His Majesty's Governments in Great Britain and the Dominions, with due regard to the circumstances of each particular part of the Empire, it being understood that any new arrangements should be supplementary to, and not in replacement of, the system of direct communication from Government to Government and the special arrangements which have been in force since 1918 for communications between Prime Ministers."

VII. Particular Aspects of Foreign Relations Discussed by Committee.

It was found convenient that certain aspects of foreign relations on matters outstanding at the time of the Conference should be referred to us, since they could be considered in greater detail, and more informally, than at meetings of the full Conference.

(*a*) *Compulsory Arbitration in International Disputes.*

One question which we studied was that of arbitration in international disputes, with special reference to the question of acceptance of Article 36 of the Statute of the Permanent Court of International Justice, providing for the compulsory submission of certain classes of cases to the Court. On this matter we decided to submit no Resolution to the Conference, but, whilst the members of the Committee were unanimous in favouring the widest possible extension of the method of arbitration for the settlement of international disputes, the feeling was that it was at present premature to accept the obligations under the Article in question. A general understanding was reached that none of the Governments represented at the Imperial Conference would take any action in the direction of the acceptance of the compulsory jurisdiction of the Permanent Court, without bringing up the matter for further discussion.

(*b*) *Adherence of the United States of America to the Protocol establishing the Permanent Court of International Justice.*

Connected with the question last mentioned, was that of adherence of the United States of America to the Protocol establishing the Permanent Court of International Justice.

The special conditions upon which the United States desired to become a party to the Protocol had been discussed at a special Conference held in Geneva in September, 1926, to which all the Governments represented at the Imperial Conference had sent representatives. We ascertained that each of these Governments was in accord with the conclusions reached by the special Conference and with the action which that Conference recommended.

(c) *The Policy of Locarno.*

The Imperial Conference was fortunate in meeting at a time just after the ratifications of the Locarno Treaty of Mutual Guarantee had been exchanged on the entry of Germany into the League of Nations. It was therefore possible to envisage the results which the Locarno Policy had achieved already, and to forecast to some extent the further results which it was hoped to secure. These were explained and discussed. It then became clear that, from the stand-point of all the Dominions and of India, there was complete approval of the manner in which the negotiations had been conducted and brought to so successful a conclusion.

Our final and unanimous conclusion was to recommend to the Conference the adoption of the following Resolution:—

"The Conference has heard with satisfaction the statement of the Secretary of State for Foreign Affairs with regard to the efforts made to ensure peace in Europe, culminating in the agreements of Locarno; and congratulates His Majesty's Government in Great Britain on its share in this successful contribution towards the promotion of the peace of the world."

APPENDIX D.

FEDERAL TAXATION ACTS AND REGULATIONS.

The following extracts, which are taken from the evidence of Mr. R. Ewing, Commonwealth Commissioner of Land Tax and Commissioner of Taxation (pp. 154-156), summarize briefly the cases in which Federal acts or regulations dealing with taxation have been challenged, whether successfully or unsuccessfully, before the High Court, including (1) cases where the attack was by reference to the first paragraph of section 55 of the Constitution; (2) cases where it was by reference to the second paragraph of section 55; (3) cases where it was on the ground that section 51 (ii) prohibits discrimination between States or parts of States; and (4) cases where it was on the ground that section 114 forbids the Commonwealth to impose any tax on property of any kind belonging to a State:—

"1. *Claims made by reference to section* 55 (1). *Land Tax Assessment Act* 1910, section 36 (2) (already referred to), deeming husband and wife joint owners of land owned by them severally. Griffith, *C.J.*, in *Osborne's* case [*Waterhouse's* case, 17 C.L.R. at p. 671, where there is a reference to *Osborne's* case], considered this provision dealt with a matter other than the imposition of tax, and would have declared it to be invalid under section 55 (1) if he had not decided it was invalid for other reasons.

Income Tax Assessment Act 1922-1925, sections 17, 21, and 28, and *Income Tax Assessment Act* 1925, sections 16, 17, 18, 19 and 20. It was claimed in the *British Imperial Oil Company's* second case that the effect of these sections was to make the respective Assessment Acts "laws imposing taxation". The Court (*see* Starke, *J.*), without elaborating its reasons, held that the sections of the first-mentioned Act were merely declaratory provisions for the purpose of the interpretation of a tax otherwise imposed, and that the sections of the last-named Act were merely machinery provisions for the carrying out of a tax otherwise imposed. The object of the claim was the invalidation of the other provisions of the Acts as dealing with matters other than the imposition of taxation.

2. *Claims made by reference to section* 55 (2).—These can be best set out under the heading of cases in which the claims were considered.

Osborne v. *The Commonwealth* (12 C.L.R. 321): *Land Tax Assessment Act* 1910, sections 36, 39, 40 and 41, imposing liability for land tax on persons who were not owners of land. The Court held that whether the sections were invalid or not, the subject of taxation was land.

Morgan v. *Deputy Federal Commissioner of Land Tax* 15 C.L.R. page 661: *Land Tax Assessment Act* 1910, section 39, provided that shareholders should be assessable in respect of land owned by the company. The Court confirmed its decision in *Osborne's* case, so far as section 55 (2) was concerned, and held the section valid on the ground that the shareholders were the real beneficial owners of the company's land.

Waterhouse v. *Deputy Federal Commissioner of Land Tax* (17 C.L.R. page 665) : *Land Tax Assessment Act* 1910-1911, section 36 (2). Section 55 (2) was not invoked, but Isaacs, *J.*, pointed out that if the provision imposed, as his colleagues apparently thought, a pecuniary obligation on a person in respect of land not owned by him, it would be new taxation, and would contravene section 55 (2). A similar opinion by the same judge occurred in *Hipsleys* case (*infra*).

National Trustees &c. Company v. *Federal Commissioner of Taxation* (22 C.L.R. page 367) : *Estate Duty Assessment Act* 1914, section 8 (4), deemed property which passed from a deceased person, within one year before his decease, by gift *inter vivos* or voluntary settlement, to be part of his estate for purposes of the duty. The basis of the claim was that property which ceased to be the property of a deceased person before his death was a different subject of taxation from property which was his at his death. In rejecting the claim, the Court was guided by the fact that similar provisions were common in estate taxation, and that the origin of that class of taxation was the passing away of property from the deceased, and not the acquisition of ownership by donees, and that in substance the subject of taxation might be regarded as the property possessed by the deceased one year before his death, less any property that he has in the meantime disposed of for value. The opinions expressed in the case show that the Court will not readily decide that a matter which Parliament has treated as a unit comprises several subjects of taxation. The test of singleness of subject appears to be a very flexible one, referable not only to general understanding and long usage, but also to the nature of the subject-matter, and to the manner in which Parliament has dealt with it, so that what would constitute several subjects in one set of circumstances might only constitute one subject in another set of circumstances.

Harding v. *Federal Commissioner of Taxation* (23 C.L.R. page 119) : *Income Tax Assessment Act* 1915-1916, section 14 (*e*), provided that income shall include 5 per cent. of the capital value of land owned and used for the purpose of residence. Having regard to similar provisions it had long been regarded, both in the Australian States and in the United Kingdom, as a proper subject of income taxation, and the Court held that section 55 (2) was not contravened. It is interesting to note that Isaacs, *J.*, takes, as the material date for deciding what is the general understanding as to singleness of subject, the date when the relevant Act was passed, and not, as did Griffith, *C.J.*, in the *National Trustees'* case, and apparently Barton, *A.C.J.*, in this case, the date when the Constitution came into being, viz., 1900.

Cornell v. *Deputy Federal Commissioner of Taxation* (29 C.L.R. page 39) : *Income Tax Assessment Act* 1915-1918, section 16 (2), provided for the assessment, in certain circumstances, of shareholders on the undistributed income of the company. Following a practically identical land tax case—*Morgan's* case—the Court held that the provision was not in contravention of section 55 (2), on the ground that the shareholders were the real and only masters of the company.

The British Imperial Oil Company Limited v. *Federal Commissioner of Taxation* (38 C.L.R. 153): *Income Tax Assessment Act* 1922-1925, section 28, provided for the assessment of business controlled by persons abroad, which appears to the Commissioner to derive no taxable income or less than the ordinary taxable income, on a percentage, determined by the Commissioner, of the gross receipts of the business. The claim was based principally on two factors, viz. (1) the section was applicable where there was no taxable income, and hence sought to tax something which was not income; and (2) gross receipts have no relation to income. The Court held that the section prescribed its own standard of taxable income, a thing which was quite competent to be done, and that gross receipts were in part income of a business within the definition of income.

Commissioner of Taxation v. *Hipsleys Limited* (38 C.L.R. 219): *War-time Profits Tax Assessment Tax* 1917-1918, section 14 (5), provides that the transferee of a business shall be personally liable to pay tax assessed, after the transfer, as payable by the former owner, if that owner fails to secure payment of the tax. The majority of the Court treat the matter as concluded by the *British Imperial Oil Company's* case. Isaacs, *J.*, pays regard to the fact, established as a legal doctrine, that the tax is a tax which regards the business as bearing the charge and so primarily the owner of the business for the time being, i.e., at the time of assessment, is a person assessable, and he remarks that if the provision purported to make a person pay another's tax simply because he had acquired that other's property, it would provide for a new tax and would constitute a second subject of taxation.

The Commissioner of Taxation v. *Weatherley* (39 C.L.R. page 190): *Income Tax Assessment Act* 1922-1925, section 17, provides, *inter alia*, that trading stock disposed of otherwise than by sale shall, in certain circumstances, be assessable as having been sold at such price as the Commissioner determines. No question as to the application of section 55 arose in this case, but it is to be noted that Higgins, *J.*, remarked on the fact that such a question had not been raised. The explanation of the learned judge's remarks is probably to be found in the significant statements of Isaacs, *J.*, in the same case, as to the extraordinary effect of the section, if the view of the majority of the Court could be established. The cases postulated by Isaacs, *J.*, seem to indicate that the section, on the majority view, is capable of being used to tax something which is in no sense income.

Lastly, in regard to section 55, attention is drawn to the case of *Buchanan* v. *The Commonwealth* (16 C.L.R. page 315), which decided that section 55 is not applicable to the power to make laws for territories acquired by the Commonwealth under section 122 of the Constitution Act.

Section 51 (ii). *Prohibition of discrimination between States.*

In the case of *Cameron* v. *Deputy Federal Commissioner of Taxation*, 32 C.L.R. page 68, Regulations 46 and 46A and Table 3 of the Income Tax Regulations 1917 were held to be invalid as discriminating between States within the meaning of section 51 (ii)

of the Constitution. The *Income Tax Assessment Act* 1915-1918 had provided that, for the purpose of computing the profits derived from any business, the value as prescribed of all live stock not disposed of at the beginning and end of the year should be taken into account. The effect of the impugned regulations and table was to prescribe values, in respect of live stock, which were fixed by reference to the boundaries of the States in which the live stock was located. The Court applied the dictum of Isaacs, *J.*, in *Barger's* case (6 C.L.R. 41): "Discrimination between localities means that, because one man or his property is in one locality, then, regardless of any other circumstances, he or it is to be treated differently from the man or similar property in another locality." The difficulties, legislative and administrative, which arose in consequence of that decision, were greater than were at first anticipated. In a second reference in the same case to the High Court it was held that, in the absence of a valid regulation, the live stock could not be brought into account at any value. In that decision it was brought out incidentally that there was no valid regulation, relating to live stock, in existence even prior to the making of the regulations which were held bad for discrimination. The position, therefore, arose that live stock had not been validly taken into account in the assessments of any taxpayer for any of the seven financial years to which the *Income Tax Assessment Acts* 1915 to 1921 were applicable. As those Acts were repealed before the case was decided, the position could not be remedied except by special legislation. Two Acts were passed, viz.:—(1) the *Income Tax Assessment (Live Stock) Act* 1924, and (2) the *War-time Profits Tax Assessment Act* 1924. The latter Act was necessary because profits for the purpose of war-time profits tax are, subject to certain modifications, determined on the same principles as they would be determined for the purposes of income tax. Both Acts prescribed new values for live stock, those values being for income tax purposes, market values, and for war-time profits tax purposes, a limited range of values within which the taxpayer could choose. In the event of a taxpayer failing to notify acceptance of those values he was deemed (by the Acts) to have accepted his existing assessment. The omission of the *War-time Profits Tax Assessment Act* 1924 to provide for certain assessments led to the passing of an amending Act (*War-time Profits Tax Assessment Act* 1926). During the debate on the bill for the amending Act certain doubts were expressed as to the validity of a provision by which a taxpayer was deemed to have accepted assessments which were invalid (in part) for constitutional reasons. To remove all doubts on the matter the bill was altered to enable taxpayers concerned to choose between (1) values in existing assessments, and (2) values chosen within range prescribed, and to authorize the Commissioner to adopt market values in the event of a taxpayer failing to make a choice. No other difficulties have been experienced in regard to "discrimination" under section 51 (ii).

Section 99.—*Prohibition of preference to one State over another.* No difficulties have arisen in regard to "preference" under section 99. A claim under this heading was made in *Cameron's* case (*supra*), but the matter was treated by the Court as being one of "discrimination" under section 51 (ii).

Section 114.—*Prohibition of tax on State property.* Questions have arisen in connexion with section 114 in the following cases:—

1. *Osborne's* case (12 C.L.R. 321) in which the *Land Tax Assessment Act* 1910 was sought to be invalidated as a whole for several reasons, one of which was that certain sections, claimed to be inseverable from the remainder of the Act, were in contravention of section 114. The sections so challenged were:—

Sections 26 and 29, which make a certain class of conditional purchasers from the Crown, and holders of perpetual leases without revaluation from the Crown, liable for land tax as owners: The claim that the sections amount to a tax on State property was rejected on the ground that the persons sought to be made liable were in substance the owners of the land, and that the sections were therefore not framed to reach any interest of the Crown as representing the State; section 13 (*a*), which exempted all land owned by a State, was considered to be in aid of that view.

Section 56, which makes land tax a first charge on land, and is, therefore, said to charge land in the hands of the Crown: The Court did not find it necessary to reach a decision on the point as the section was treated as severable, assuming it to be invalid, but Griffith, *C.J.*, and Barton, *J.*, were of opinion that the section should not be construed as applying to Crown lands, especially in view of section 13 (*a*).

2. *Attorney-General for Queensland* v. *Attorney-General for Commonwealth*, 20 C.L.R. page 148: The original *Land Tax Assessment Act* made holders from the Crown of perpetual leases without revaluation, and certain conditional purchases from the Crown, liable to land tax. *Osborne's* case incidentally decided that such taxation was valid on the ground that persons sought to be taxed, and not the Crown as representing the States, were in substance and effect the owners of the land. An amending Act 1914 extended the area of taxation to embrace Crown lessees who were not in substance the owners of the land. On the amending legislation being challenged as constituting a tax on State property in contravention of section 114, it was held that the tax was only imposed on the lessee's interest, which was not in any relevant sense property of the State."

APPENDIX E.

CUSTOMS DUTIES ON GOODS IMPORTED BY STATE GOVERNMENTS.

The following extracts are taken from correspondence in 1924 between the Premier of Western Australia and the Prime Minister of the Commonwealth, a copy of which is set out in Exhibit 33 (evidence, p. 595) :—

Extract from letter, dated 2nd April, 1924, from the Premier of Western Australia.

"The Government of this State has recently been under the necessity of obtaining ten new locomotives in order to cope with the increasing traffic on its railways which has arisen from its vigorous policy of development.

Tenders were invited in Australia and in Great Britain. One Australian tender only was received, viz. from Messrs. Thompson & Co., Castlemaine, Victoria, quoting delivery in 16 to 24 months' time. This delivery was subject to the non-acceptance by the Federal Government of a tender submitted by the firm for fourteen locomotives for the Oodnadatta Railway, in the event of the acceptance of which the firm would be unable to undertake the work except upon a greatly extended period of delivery, which put their tender altogether beyond further consideration. The most favorable British tender—that of the North British Locomotive Company—quoted delivery f.o.b. in six months.

It being essential, in order to meet the prospective demands of traffic, that this new locomotive power be made available to the Railway Department by the close of the present year, and press reports having indicated that your Government had accepted Messrs. Thompson & Co.'s tender for the fourteen locomotives referred to, I had no alternative but to accept the tender of the North British Company, and I now submit to you a request that, in view of the circumstances, your Government will direct that these locomotives be admitted free of Customs duty.

Apart from the question of delivery dates, I put the following considerations:—

(*a*) Our own locomotive workshops are, and will be for some time to come, fully occupied with a programme covering the construction of twenty new locomotives and the super-heating of many others. Demands for replacement of locomotive boilers are also abnormal, due to the large number of locomotives (107) placed in traffic over twenty years ago (1901-1903) which are now coming in for replacement.

(*b*) My Government has incurred very considerable loan expenditure in plant and machinery to facilitate the local building of locomotives and boilers at our own shops, proof of which is found in our ability to undertake the building of the twenty locomotives above mentioned, and to have increased our boiler production from six in the year ended 30th June, 1918, and four in the year 1918-19 to 26 during the present financial year and probably more than that next year. It has been necessary to import 32 boilers to make up the balance of our abnormal requirements for the two years 1st July, 1923, to 30th June, 1925, but the plant installed by this Government will be adequate for normal requirements for some years to come.

5. Without regarding the enormous differences in prices and the interest bill involved thereby, if it had been possible for this State to have accepted the Australian tender (as your Government found it practicable to do), that tender might have been accepted. But my predecessors in office were not in a position, as your Railway Administration apparently was, to make arrangements which would not necessitate the purchase of other locomotives. The delivery quoted your Government by the Victorian firm—April-November, 1925—would have been too late for our pressing requirements. . . .

It would have been infinitely harmful to this part of Australia to have taken any action other than that which would secure this haulage power for our products in sufficient time to haul them to the coast for export. You will probably realize that it would have been unthinkable to let our products of wheat, timber, &c., lie at sidings in the country until Messrs Thompson and Co., of Castlemaine, could build the locomotives to haul them to the ports". . . .

Extract from letter, dated the 25th August, 1924, from the Prime Minister.

"With reference to your predecessor's letter of the 2nd April, in which it was requested that ten new locomotives and 32 boilers being obtained for the Railways of your State be admitted free of Customs duty, I desire to inform you that the matter has been carefully considered by my colleague, the Minister for Trade and Customs, who regrets, however, that the request cannot be acceded to".

Extract from letter, dated the 12th September, 1924, from the Premier of Western Australia.

"I have your letter of the 25th August, No. D. 508/132 replying to my predecessor's letter dated 2nd April, in which you notify that the request for the admission, free of duty, of ten new locomotives and the refund of about £12,000 already paid in duty on 32 boilers for our State railway system cannot be acceded to. Although your

letter represents this decision as being that of your colleague, the Minister for Trade and Customs, I have no option but to assume that your Government as a whole accepts the responsibility for it.

. . . . I venture to suggest its reconsideration, at all events so far as the ten locomotives are concerned.

4. Sir James Mitchell's letter of the 2nd April sets forth the points affecting the question, which, although they should be fully re-examined, may be briefly repeated, viz.,

(*a*) Western Australia is occupied to her fullest capacity in locomotive construction, and is doing everything reasonably possible to avoid future importation of locomotives or boilers.

(*b*) It was impossible to obtain these ten locomotives in Australia in time for our 1924-25 harvest traffic, for which traffic they are essential to meet demands created by the rapid progress of agricultural and other development in this State.

(*c*) Under the Australian tender the ten locomotives would not have been due for delivery until August-November, 1925; but this delivery even was subject to your Government *not* accepting the firm's tender for fourteen locomotives (which tender was accepted at a cost about £52,000 in excess of the lowest British tender). The British tender accepted by this State gives delivery on traffic in Western Australia a couple of months from now, and is £48,720 lower in price than the Australian tender. It is the policy of the State to avoid importing locomotives or boilers except as, in this case, in circumstances of absolute necessity.

(*d*) In regard to the question of price, Messrs. Thompson and Co. quoted £12,500 per locomotive c.i.f. Fremantle, as against the North British Co.'s tender of £7,628 per locomotive c.i.f. Fremantle. That is to say the acceptance of the Australian tender would, apart from the question of duty, have imposed a loan burden of £48,720 upon the people of this State, carrying an interest charge of nearly £3,000 per annum. . . .

(*f*) You will readily understand that the purchase of these ten locomotives for this State will be a charge to our loan funds. Duty, if charged—it is hardly conceivable that it should be—will amount to about £21,000. In view of the circumstances as to period of delivery alone without regarding the enormous discrepancy in price, under which my Government has been constrained to place this order in Great Britain, I put it to you that it would be almost immoral to take this £21,000 from State loan money and credit it as Federal revenue.

In the case of the 32 locomotive boilers above referred to, which abnormal pressure compelled this State to obtain from outside, being unable to undertake their manufacture in its own temporarily over-occupied shops, the best tendering (delivered c.i.f. Fremantle in both cases) was:—

Australian.—Thompson and Co., Castlemaine		£2,200 per boiler.
British.—North British Locomotive Co. and Yorkshire Engineering Co.		
Average tender price ..	£1,359	
Duty charges	374	
		1,733 " "
Difference, duty paid, in favour British tender		467 " "

On the 32 boilers, notwithstanding the Customs Duty charges (about £11,960) there was still a benefit of £14,944 in accepting the British tender, in addition to the advantage of five months delivery from Great Britain as against practically a year from Victoria . . . .

I ask then:—

(*a*) For the admission of the ten locomotives referred to free of Customs duty;

(*b*) For consideration as to the similar admission of the 32 boilers." . . . . .

Copy of letter, dated the 16*th October*, 1924, *from the Prime Minister.*

"With reference to your letter of the 12th September, No. W.R. 1658/24, regarding the request for the admission, free of duty, of ten new locomotives and for the refund of the amount already paid in duty on 32 boilers required for the railways in your State, I desire to inform you that this matter has formed the subject of a report by the Tariff Board to my colleague, the Minister for Trade and Customs, who, after careful consideration, has decided that the request cannot be acceded to, as he is not inclined to modify the Tariff conditions imposed for the protection of an established Australian industry."

APPENDIX F.

THE POWER OF ALTERING THE CONSTITUTION UNDER SECTION 128.

The following extract sets out an opinion given by Mr. Owen Dixon, K.C., now Mr. Justice Dixon, a copy of which was forwarded to the Commission by Mr. J. J. Kenneally, the Federal President of the Australian Labour Party (evidence, pp. 1112-1113):—

"My opinion is sought upon the questions whether the proposal to amend the Constitution so as to confide to Parliament alone the power of constitutional alteration, subject to specified restrictions, can be accomplished and how.

The proposal is, as I understand it, that save for a few definite constitutional "guarantees" or "checks" Australia should receive a flexible Constitution, and in the future constitutional alterations should be effected by the Federal Parliament. The guarantees or checks suggested are that without a referendum no alteration should be permissible which related (*a*) to the adult franchise, (*b*) to the initiative referendum and recall if established, (*c*) to the proposed prohibition of conscription.

The existing power of amending the Constitution is contained in section 128, and the question is whether that power authorizes the alteration in section 128 itself which would be required in order to confer for the future the power of amendment upon Parliament alone. In my opinion it does authorize such an alteration.

When section 128 speaks of "this Constitution" it refers to the whole "Constitution of the Commonwealth" mentioned in and following section 9 of the covering clauses. It includes section 128 itself. I do not think that there can be any doubt that complete power of amending the whole instrument, including the provision prescribing the methods of alteration, was intended to be given by section 128.

I think the proposals would be effectually carried out if the following alterations were made in the Constitution in the manner prescribed by section 128:—

(*a*) In section 128, in the first paragraph, strike out the words "and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives," and add "and receive the Royal Assent."

(*b*) Strike out the third and the fifth or last paragraphs of section 128.

(*c*) Add at the end of section 128:—But notwithstanding anything in this section unless not less than two nor more than six months after its passage through Parliament the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of Parliament no alteration shall be made

affecting the following provisions, viz:—Sections (set out the sections containing the provisions to be preserved, e.g., 30, 60A, 72, 80, 116, as may be desired) nor affecting any alteration which may be made in this Constitution whereby proposed laws may be submitted by a number or proportion of the electors or may be directly enacted (subject to the Royal Assent) by the electors.

(*d*) Repeal section 8.

(*e*) Substitute for section 30 the following:—

"30. The qualification of an elector of members of Parliament whether senators or members of the House of Representatives shall be that he is a natural born or naturalized subject of the King of the age of 21 years and an inhabitant of Australia who has lived therein for a period of at least six months".

(*f*) Insert after section 60 the following:—

"60A. No law shall be valid by which active service of a naval, military or warlike character is in any way made compulsory".

I do not know whether it is desired to extend the prohibition of conscription further than the suggested section 60A, but if so no doubt little difficulty would be experienced in expressing the extension.

I have suggested the omission of the fifth paragraph of section 128, because I understand the greatest flexibility is desired. This paragraph, if not omitted, might give rise to contentions that no amendment which impaired the Federal character of the system might be made by Parliament. If the above alterations were made I think Parliament's power of constitutional alteration would, save for the limitation actually expressed in section 128 as so amended, be absolute.

(Sgd.) OWEN DIXON.

Selborne Chambers, 24th February, 1928."

APPENDIX G.

LIST OF EXHIBITS.

Number.	Nature.	By Whom Tendered.
1	Correspondence between South African and Commonwealth Governments in relation to the formation of the South African Union (Parliamentary Paper, 1912, No. 85)	H. S. Nicholas
2	Extract from *Commonwealth Gazette*, No. 20, of 3rd March, 1921.—Creation of Commonwealth Department of Health	Dr. J. H. L. Cumpston
3	Report of the Royal Commission on Health (Parliamentary Paper 1926, No. 3)	Dr. J. H. L. Cumpston
4	Conference of Ministers of Health of the Commonwealth and States of Australia, held at Melbourne on 21st and 22nd July, 1926, to consider the recommendations of the Royal Commission on Health	Dr. J. H. L. Cumpston
5	Report of the Federal Health Council of Australia held at Melbourne, 25th–28th January, 1927	Dr. J. H. L. Cumpston
6	Statement showing the financial assistance granted to the States by the Commonwealth since Federation	J. T. Heathershaw
7	Conference of Commonwealth and State Ministers, held at Melbourne, June, 1927, and at Sydney, July, 1927, to consider, *inter alia*, the financial arrangements between the States and the Commonwealth	J. T. Heathershaw
8	Five Reports of the Royal Commission on Taxation (1921–1923)	R. Ewing
9	Industrial Commissioner's Judgment of the 19th November, 1926, *re* the Engineers (State) Conciliation Committee's jurisdiction in the case of an Order of the Commonwealth Court of Conciliation and Arbitration not to deal with a specified dispute	A. B. Piddington
10	Comparative figures on 31st December, 1897, and 30th June, 1926, of populations, and numbers of Members of Parliament	Dr. J. F. Watson
11	Analysis of Referendums on 26th April, 1911, 31st May, 1913, 28th October, 1916, 20th December, 1917, 19th December, 1919, and 4th September, 1926	Dr. J. F. Watson
12	Map of the Commonwealth of Australia, indicating historical subdivisions	Dr. J. F. Watson
13	Extract from the *Sydney Mail*, dated 21st September, 1927, containing an article entitled "The Koala's Death Knell"	D. G. Stead
14	Prohibition of exportation of certain birds and the skins, eggs, and plumage thereof.—Extract from *Commonwealth of Australia Gazette*, No. 23, dated 29th March, 1923	D. G. Stead
15	Statement of export of skins of marsupials from Port of Sydney, for the years 1919–1924	D. G. Stead
16	The Department of Commerce of the United States of America.—Organization of the Bureau of Fisheries (1915)	D. G. Stead
17	An article entitled "Marine and Fresh Water Fisheries in Australia" (reprinted from the Official *Year-Book* of the Commonwealth, 1924)	D. G. Stead

Number.	Nature.	By Whom Tendered.
18	Statement showing growth of Commonwealth Revenue, during period of 26½ years, ending 30th June, 1927	J. T. Heathershaw
19	Statement showing surpluses and deficiencies in the Commonwealth Revenue	J. T. Heathershaw
20	Air Navigation Regulations (Commonwealth Statutory Rules No. 33 of 1921)	H. C. Brinsmead
21	Extracts from an article by J. E. Pope, Ph. D., on "The Farm Relief Measures before the United States Congress"	E. J. Mulvany
22	Extract from report upon "Large Scale Co-operative Marketing in the United States of America" by R. B. Forrester	E. J. Mulvany
23	Subsidy payments from civil aviation funds for air-transport services and flying training schools during the years 1921–1927	H. C. Brinsmead
24	Postmaster-General's Department. — Statement showing cost of working of the Postal, Telegraph, and Telephone Branches	G. G. Haldane
25	Statement showing total and electoral populations and average number of electors in each electoral division	J. D. Farrar
26	Statement showing areas of the Federal Electoral Divisions as at December, 1922	J. D. Farrar
27	Summary and list of unionists in Australia belonging to organizations registered under the Commonwealth Court of Conciliation and Arbitration	M. M. Stewart
28	List of industries covered in whole or in part by awards of the Commonwealth Court of Conciliation and Arbitration	M. M. Stewart
29	List and summary of applications under section 20 of the Commonwealth Conciliation and Arbitration Act from 1st January, 1926, to 14th October, 1927	M. M. Stewart
30	Statement showing electoral enrolment of each Federal Division at the time of each re-distribution (1906, 1912, 1922)	J. D. Farrar
31	Statement showing number of electors in each electorate as at 30th September, 1927	J. D. Farrar
32	Department of Agricultural Bank and Industries Assistance Board, Western Australia.—Statement of advances, repayments, and outstanding balances	C. J. Moran
33	Importation of railway locomotives into Western Australia.—Copies of correspondence between the Prime Minister and the Premier relating to imposition of Customs duties	L. T. Hickey
34	Western Australia and Federation— (*a*) Papers outlining the State's case prepared by the advisory committee appointed by the Government of Western Australia for submission to the Royal Commission upon Finances, Western Australia, as affected by Federation ; (*b*) Minutes of evidence of the Royal Commission ; (*c*) Report of the Royal Commission	G. W. Simpson
35	The *Western Australian Industrial Gazette* for the quarter ending 30th June, 1927, issued by the Western Australian Department of Labour	F. E. Walsh
36	Statements showing— (*a*) comparative prices of machinery before and after Federation ; (*b*) freights on machinery interstate and from United Kingdom ; and (*c*) exports for the year 1926–27	M. Padbury

Number.	Nature.	By Whom Tendered.
37	Statement comparing salaries of corresponding positions in the States of Victoria, New South Wales, Queensland and South Australia	A. W. Lovegrove
38	Articles entitled "The Development and Migration Commission—Its task" and "Developing a White Continent"	H. W. Gepp
39	Commonwealth Department of Markets.—Statement showing costs of inspection in the Meat Export Branch for the period 1916–1927	R. P. Allen
40	Postmaster-General's Department— (*a*) Statement of receipts and expenditure for the years 1901–1927 under the several States (*b*) Statement of receipts and expenditure on Air Mail Services	J. Murray
41	Agricultural implements manufactured by H. V. McKay Pty. Ltd.—Comparison of prices as affected by the Tariff	H. B. Ferguson
42	Pamphlets concerning the activities of the Victorian Railways Department	H. W. Clapp
43	Statement showing numbers of assisted migrants who have arrived in Australia since 1st January, 1923	H. W. Gepp
44	(*a*) Amended statement showing numbers of assisted migrants who have arrived in Australia since 1st January, 1923. (*b*) Particulars as to assisted migrants for the period—1st January, 1923, to December, 1927	H. W. Gepp
45	List of single voyage permits issued to unlicensed British Ships during 1924-1926	C. B. Black
46	Articles reprinted from the Hobart *Mercury*, relating to Tasmanian disabilities	C. B. Black
47	Letter, dated 7th January, 1928, suggesting that the medical profession should be part of the Civil Service	C. A. Target
48	Return showing Wages Boards in existence in Tasmania, also rates of wages paid and number of hours worked, in trades working under Wages Board Determinations (contained in the 12th Annual Report of the Industrial Department for 1926–27)	R. J. Meagher
49	Return showing probates granted in States other than South Australia, and re-sealed in South Australia	H. Boothby
50	Annual report of the Woods and Forests Department, South Australia, for the year ended 30th June, 1927	E. Julius
51	Analysis of Land and Income Tax and Stamp Duty receipts in the State of South Australia	E. H. Cornish
52	Government Savings Bank of New South Wales: (*a*) Returns showing— (1) annual progress since 1906. (2) advances made and current by the Rural Bank Department and the Homes Department. (*b*) Report of the Commissioners for the year ended 30th June, 1927	C. F. Hudson
53	Commonwealth Bank of Australia.—Return showing the annual progress of the Savings Bank Department in each year since 1913	G. Arnott
54	Statistics relating to the product of fish in New South Wales, and exports of fish from New South Wales	A. W. Wood
55	(*a*) Table of Industrial Awards in force in New South Wales as at 17th February, 1928; and (*b*) list of Unions registered under the Industrial Arbitration Act of New South Wales	F. W. Kitching

Number.	Nature.	By Whom Tendered.
56	Returns showing— (*a*) imports and exports of live stock to and from Victoria by land for the years 1923–27; and (*b*) outbreaks of pleuro pneumonia traceable to cattle from New South Wales	E. A. Kendall
57	Opinion by Mr. Owen Dixon, K.C., relating to the legislative powers of the State of Victoria to impose and enforce Income Taxation in certain cases	R. M. Weldon
58	Customs Duties.—Statement showing duties remitted by the Commonwealth to the Government of Victoria, the Victorian Railway Commissioners, and other Government bodies during 1921–27	W. G. Templeton
59	Article entitled "Drift of Population to the Cities" reprinted from report of the Australasian Association for the Advancement of Science, 1924	E. T. McPhee
60	Population of the States and of the Metropolitan Cities for the years 1900 and 1926	E. T. McPhee
61	Aboriginals— (*a*) report of the Queensland Aboriginal Department for the year ended 31st December, 1926; (*b*) The *Aboriginals Protection and Restriction of the Sale of Opium Acts* 1897—1901, and regulations thereunder	J. W. Bleakley
62	Resolutions of the Chambers of Commerce with regard to uniformity in the collection of Customs duties	A. Hertzberg
63	Graph showing organization of Railway Department, Queensland	J. W. Davidson
64	(*a*) Reports of the Committee of Direction of Fruit Marketing, Queensland (*b*) The *Fruit Marketing Organization Acts* 1923–1925 (Queensland), and regulations thereunder	W. Ranger
65	(*a*) Rules of the North Queensland Employers' Association. (*b*) Annual report of the Association for the year ended 31st January, 1928. (*c*) List of State awards under which members of the Association operate. (*d*) List of Federal awards that concern members of the Association. (*e*) Federal and State awards which overlap.	T. E. Thorpe
66	Clothing Trade Award made by the Court of Industrial Arbitration of Queensland (contained in *Queensland Government Gazette* of 24th August, 1925)	T. E. Thorpe
67	Correspondence relating to difficulty experienced by the North Queensland Employers' Association in obtaining copies of Federal awards	T. E. Thorpe
68	Return showing revenue of Queensland for the years 1889–1898 apportioned in accordance with proposed Financial Districts Bill of 1888	A. A. Mawdsley
69	Statement regarding control of aviation by Mr. Hudson Fysh, Managing Director of the Queensland and Northern Territory Aerial Services Ltd.	J. J. Verney
70	Article entitled "Restitution of Conjugal Rights" contained in the Australian Law Journals of 5th January and 15th February, 1928	W. K. S. Mackenzie
71	Log of claims for wages, salaries, and working conditions served on the Railway Service employees of certain States	R. V. Keane

Number.	Nature.	By Whom Tendered.
72	Pamphlet entitled "The Frontiers of Settlement in Australia" (reprinted from the *Geographical Review* of January, 1926)	Professor T. Griffith-Taylor
73	Two charts illustrating Australia subdivided into six States equally endowed with agricultural, desert, and pastoral lands	Professor T. Griffith-Taylor
74	Pamphlet entitled "The Federal Constitution, a review and a proposal"	C. E. G. Sobey
75	Victorian Timber Industry.—Particulars as to prices, duties and value of imports	C. H. Wickens
76	Freights on wheat in the several States	W. C. Cambridge
77	Report of the Royal Commission on the Moving Picture Industry in Australia	H. S. Nicholas
78	Suggestions in regard to the reform of the Senate ..	L. Lewis
79	Financial Agreement.—Statement showing estimated amounts involved in future loan raisings in the State of Western Australia	G. W. Simpson
80	List of Senators appointed by the Governor of a State or chosen by the Parliament of a State, pursuant to section 15 of the Constitution	J. D. Farrar

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TO THE

REPORT OF THE ROYAL COMMISSION ON THE CONSTITUTION OF THE COMMONWEALTH.

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By Authority: H. J. GREEN, Government Printer, Canberra.